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United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,

Appellant,

No. 2209.

vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
CLARENCE W. ROBNETT, WILLIAM DWYER,
and FRANK W. KETTENBACH,

Appellees.

THE UNITED STATES OF AMERICA,

Appellant,

No. 2210.

vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
CLARENCE W. ROBNETT, WILLIAM DWYER,
THE IDAHO TRUST COMPANY, a Corporation,
THE LEWISTON NATIONAL BANK, a Corpora-
tion, THE CLEARWATER TIMBER COMPANY,
a Corporation, ELIZABETH W. THATCHER,
CURTIS THATCHER, ELIZABETH WHITE,
EDNA P. KESTER, ELIZABETH KETTEN-
BACH, MARTHA E. HALLETT, and KITTY
E. DWYER,

Appellees.

THE UNITED STATES OF AMERICA,

Appellant,

No. 2211.

vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
and WILLIAM DWYER,

Appellees.

Transcript of Record.

FILED

JAN 23 1913

VOLUME XIII.

(Pages 4575 to 4724 Inclusive.)

Appeals from the District Court of the United States for the
District of Idaho, Central Division.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,
vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
and WILLIAM DWYER,
Appellees.

Transcript of Record.

VOLUME XIII.

(Pages 4575 to 4724, Inclusive.)

Appeals from the District Court of the United States for the
District of Idaho, Central Division.

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER, WILLIAM DWYER,
Defendants.

Bill in Equity.

To the Honorable, the Judges of the Circuit Court of the United States for the District of Idaho:

The United States of America, the complainant in the above-entitled cause, by George W. Wickersham, the Attorney General of the United States of America, files this the said complainant's original bill of complaint, against the persons hereinabove, in the caption hereof, named as defendants.

The said complainant respectfully represents to this Court:

I. That prior to the acts hereinafter complained of, the complainant was the owner of the lands hereinafter described, the said lands constituting a part of the public lands of the United States and being situated within the State and District of Idaho within the jurisdiction of this Court.

That by an act of Congress of the United States, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nevada and in Washington Territory," approved June 3, 1878, as

amended and extended to all public land States by the act of Congress of August 4, [1*] 1892, it was provided, among other things, in substance that surveyed public lands of the United States within the public land States, valuable chiefly for timber, but unfit for cultivation, might be sold to citizens of the United States or persons who declared their intention to become such, in quantities not to exceed 160 acres to any one person or association of persons, at the minimum price of Two Dollars and Fifty Cents (\$2.50) per acre.

It was further provided in said act as follows:

“That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivision the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; containing no mining or other improvements, except for ditch or canal purposes where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this Act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or in-

*Page-number appearing at foot of page of original certified Record.

directly, made any agreement of contract, in any way or manner, with any person or persons, whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself.”

which statement was required by said act to be verified by the oath of the applicant before the register or receiver of the land office within the district where the land was situated.

And said act further provides that:

“If any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for said lands and all right and title to the same; and any grant or conveyance which he may have made, [2] except in the hands of *bona fide* purchasers, shall be null and void.”

And said Act further provided that after the expiration of 60 days’ publication of said application:

“The person desiring to purchase shall furnish to the register of the land office satisfactory evidence * * * that the land is of the character contemplated in this act, unoccupied and without improvements other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and receiver, * * * the applicant may

be permitted to enter said tract, and, on the transmission of the General Land Office of the papers and testimony in the case, a patent shall issue thereon."

Said act further provided that effect should be given to its provisions by regulations to be prescribed by the Commissioner of the General Land Office.

II.

That pursuant to the authority given by said act, the Commissioner of the General Land Office prescribed and promulgated certain regulations to give effect to the provisions of said act, among others, the following:

That after the expiration of the 60 days' publication, the person desiring to purchase the land described in his application to purchase should under oath, make answer to certain questions as follows:

"Have you sold or transferred your claim to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract in any way or manner, with any person whomsoever by which the title which you may acquire from the Government of the United States may inure, in whole or in part, to the benefit of any person except yourself?"

And

"Do you make this entry in good faith for the appropriation of the land exclusively to your own use and not for the use or benefit of any other person?" [3]

And

“Has any other person than yourself, or has any firm, corporation, or association, any interest in the entry you are now making, or in the land, or in the timber thereon?”

Also the following

“Did you pay, out of your own individual funds, all the expenses in connection with making this filing, and do you expect to pay for the land with your own money?”

And

“Where did you get the money with which to pay for this land, and how long have you had the same in your actual possession?”

III.

That heretofore, to wit, on the first day of July, in the year 1902, and at divers other times before and after that day, and before the making of the several entries hereinafter mentioned and designated, in the State of Idaho, William F. Kettenbach, George H. Kester and William Dwyer, who are hereinbefore and in the caption of this bill named as defendants, did unlawfully and corruptly combine, conspire, confederate and agree together, and with each other and with divers other persons, some of whom are hereinafter named and others of whom are to the complainant unknown, and did form, make and enter into an unlawful, corrupt and fraudulent conspiracy, combination and agreement with each other and with the other persons aforesaid, for the purpose and to the end of defrauding the complainant of the title and ownership of divers large tracts of public land then owned by the complainant and lying in the district of

public lands subject to entry at the land office of the United States located at Lewiston, in the State of Idaho, [4] and for the purpose and to the end of defrauding the complainant out of the use, occupation, and possession of the said tracts of public land; and for the purpose and the end of defrauding the United States by acquiring from the United States, through and by means of the Act of Congress approved on June 3, 1878, hereinbefore mentioned, for themselves and for each of themselves, the title to large bodies of timber lands, then being public lands and the property of the United States, in area and to an amount much greater than the area and the amount which they, the said defendants, individually or collectively, could lawfully, and in accordance with the provisions of the said statute, acquire; and for the purpose and to the end of defrauding the United States by causing and procuring divers and many other persons severally to make entry of, and to purchase from the United States, under and in professed accordance with the provisions of said statute, divers and many tracts of the public land, then being the property of the United States, they, the said defendants, then and there, intending and designing afterwards to acquire from the said other persons, the said lands so to be entered and purchased by the said other persons, and intending and designing to cause and procure the said lands to be entered and purchased in the interest and for the ultimate benefit and advantage of themselves, the said defendants, whereby, and in and by which procurement with the intent aforesaid provisions of the said statute should be

abused and perverted and the true intent and purposes of the said statute should be defeated; and for the purpose of accomplishing the said ends and of defrauding the United States by divers fraudulent and unlawful means, that is to say, by means of false, fraudulent and unlawful entries to be made of the aforesaid tracts of [5] public land at the land office aforesaid, and by means of perjury, the subornation of perjury, the procurement of false swearing, and by means of other falsehoods, false pretenses and misrepresentations, whereby the officers of the United States should be deceived and imposed upon and should be induced and procured to divest the United States of its title to the said lands and to convey the said title to the United States to divers persons not lawfully entitled thereto contrary to the laws of the United States and for the benefit, advantage and profit of the said defendants.

IV. That as a part of the said conspiracy and agreement so far as aforesaid made and entered into by the said defendants hereinbefore named, and as a part of the said unlawful and fraudulent means whereby the said unlawful purposes of the said conspiracy were to be effected, it was, at the times and place aforesaid by the said defendants, mutually agreed, designed and contemplated that they, the said defendants, should persuade, employ and otherwise induce and procure a large number of other persons severally to purchase and to make entries of divers tracts of the public lands aforesaid under and in pretended and apparent accordance with the aforesaid Act of Congress approved June 3, 1878,

as amended by the Act of Congress approved August 4, 1892, that before the said other persons should file the sworn statements by that statute prescribed, or should apply to enter and purchase such other lands or should otherwise take any steps or initiate any proceedings to that end, and before the making of such entries and purchases, and as a means of persuading and inducing the said other persons to make such entries and purchases, the said defendants should make and [6] enter into certain agreements, contracts and understandings with the said other persons, severally, whereby and by the terms of which agreements, contracts and understandings, the said defendants or some of them, should agree and contract to buy of the said other persons, severally, and the said other persons, severally should agree and contract to sell to the said defendants, or some of them, the respective tracts so to be entered and purchased by the said other persons when and so soon as the said other persons should obtain from the United States the titles to the said tracts by them to be entered and purchased, or shortly thereafter; that, thereupon and after the making of such unlawful contracts and agreements, and while the same should subsist and continue, the said defendants should cause and procure the said other persons severally to apply at the land office aforesaid to make entries of and to purchase divers tracts of the said public lands in professed accordance with the statutes aforesaid, and should cause and procure each of the said persons so applying, at the time of making his application to enter, and in connection with and as a part of such

application, to execute, sign, make oath to and file in the said land office a sworn statement of the character, substance, tenor and purport prescribed by the said act of Congress approved on June 3, 1878, which act is hereinbefore mentioned, stated and in part recited, in which statement such applicant should declare and on his oath represent, among other things, that he, the said applicant, did not apply to purchase the land by him applied for on speculation, but in good faith to appropriate the same to his own exclusive use and benefit, and that he had not, directly or indirectly, made any agreement or contract, in any [7] way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself, the said defendants intending, designing and contemplating that each of the said other persons so to be induced to make such applications and to file such sworn statements should in doing so commit and be guilty of wilful and corrupt perjury, and should swear falsely and corruptly, and should defraud the United States and fraudulently deceive and impose upon the officers of the said land office and upon other officers of the United States charged with the administration of the laws regulating the disposal of the public lands, inasmuch and because in truth and in fact each of the said persons so to be induced to make such applications should, before the making of his said application and the filing of his said sworn statement, as the said defendants intended and contemplated, have made with the said defendants or

some of them the agreement and contract aforesaid, by the terms of which such persons so to make application should have agreed to sell to the defendants or to some of them, and the defendants or some of them should have agreed to buy, the land and the title which such person should acquire from the United States by means of the application and entry by him to be made. [8]

V. That as a further part of the said conspiracy and agreement so as aforesaid made and entered into by said defendants hereinbefore named, and as a further part of the unlawful and fraudulent means whereby the said unlawful purposes of the said conspiracy were to be effected, it was, at the time and the place aforesaid by the said defendants, mutually agreed, designed and contemplated that they, the said defendants, should cause and procure the said other persons hereinbefore mentioned and such who were, as aforesaid, to be induced to apply to enter and purchase the tracts of public lands aforesaid, to make such publication and advertisement as are prescribed by the statute hereinbefore mentioned and in part recited, and after such publication and after the period of sixty days by the said statute prescribed, to appear before the proper officer or officers of the said land office and to make such proof before the said officers as is prescribed by the said statute, and then and there to answer on oath and in writing the interrogatories which were as aforesaid prescribed by the Commissioner of the General Land Office to be propounded to all persons seeking to make entries of public lands under the statute hereinbefore men-

tioned; and it was intended, designed and contemplated by the said defendants that each of the said other persons so appearing and answering should, in answer to the said interrogatories when the same should be propounded to him, on his oath declare, represent and swear, among other things, that he had not, since the making of the sworn statement previously as aforesaid made and filed by him in applying to make entry, sold or transferred his claim to the land sought by him to be entered; and that he, the said applicant, had not, at the time of his appearing and answering the said interrogatories, [9] directly or indirectly made any contract or agreement or contract in any way or manner, with any person whomsoever, by which the title sought by such applicant to be acquired might inure, in whole or in part, to the benefit of any person except himself; and that he, the said applicant, was at the time aforesaid making his intended entry in good faith for the appropriation of the land exclusively to his own use and not for the use and benefit of any other person; and that no other person than himself, the said applicant, and that no firm, corporation or association, had, at the time last aforesaid, any interest in the said entry or in the land sought to be entered or in the timber upon said land; the said defendants intending, designing and contemplating that each of the said other persons so to be caused and procured to answer the said interrogatories in the manner and to the effect last stated should in doing so commit and be guilty of wilful and corrupt false swearing, and should swear falsely and corruptly, and should defraud the United States, and

should fraudulently deceive and impose upon the officers of the United States charged with the administration of the laws regulating the disposal of the public lands, inasmuch and because in truth and in fact each of the said persons so to be induced to make the proofs and to answer the interrogatories aforesaid in the manner and to the effect aforesaid should, as the said defendants intended and contemplated, before the making of such proofs and answers, have made and entered into the contracts and agreements hereinbefore stated, which contracts were to be, at the time last aforesaid, still continuing and subsisting, by which the title to be by him acquired should inure to the benefit of the said defendants or of some of them, and by which the said defendants or some of them should have an interest in the land and the [10] title so to be acquired, and by reason of which contract and agreement such person seeking to make entry did not do so in good faith to appropriate such land to his own exclusive use and benefit, but for the use and benefit of the said defendants or some of them.

VI. That as a further part of the said conspiracy and agreement so as aforesaid made and entered into by the said defendants hereinbefore named, and as a further part of the unlawful means whereby the said unlawful purposes of the said conspiracy were to be effected, it was, at the times and the place aforesaid, by the said defendants, mutually agreed, designed and contemplated that they, the said defendants, after having procured the other persons hereinbefore mentioned to make application to enter the lands

hereinbefore mentioned in the manner and under the circumstances aforesaid should furnish and advance to each of the said persons so much money as should be necessary to enable such person to pay to the proper officers of the United States the amount of money prescribed by law to be paid upon the making of the entry by such person to be made, and that the sum so by the defendants advanced should be deducted from the amount agreed to be paid by them to such person as the purchase price of the land by him entered; and it was further intended and contemplated by the said defendants that they should cause and procure each of the said other persons, who were to be induced to make entries as aforesaid, when such person should appear before the proper officers of the aforesaid land office to answer the interrogatories that he, the said person then applying to make entry, had paid out of his own individual funds all the expenses in connection with the filing by him made; and that he [11] expected to pay for the land by him sought to be entered with his own money; and that the money with which he intended to pay for the said land was derived by him from other sources than the defendants, and that he had had the said money in his actual possession for a longer period than in fact he had so had the same; the said defendants mutually intending, designing and contemplating that each of the said other persons, so to be caused and procured so to answer the said interrogatories, should in doing so commit and be guilty of wilful and corrupt false swearing, and should swear falsely and corruptly and should defraud the United States, and should

fraudulently deceive and impose upon the officers of the United States, concerned with the administration of the laws regulating the disposal of the public lands, inasmuch and because in truth and in fact each of the said persons so to be caused and procured to answer the said interrogatories in the manner and to the effect aforesaid should, as the said defendants intended and contemplated, before the making of such answers, have received from the said defendants or from some of them the money by him to be used in the purchase of the land sought by him to be entered, and should not pay or intend or expect to pay for the said land out of his own individual funds or with his own money, and should not pay or intend or expect to pay the expenses of his filing and entry out of such funds or money, and should, moreover, swear falsely and fraudulently in respect of other matters, the subject of such interrogatories. [12]

VII. That thereafter, that is to say, after the formation and making of the said unlawful conspiracy and agreement so as aforesaid made and entered into by the said defendants hereinbefore named, and at divers times in the State of Idaho, in pursuance and execution of the said conspiracy and for the purpose of effecting the said unlawful purpose thereof, the said defendants, or some of them, did make and enter into fraudulent, corrupt and unlawful contracts, agreements, arrangements and understandings with a large number of persons, severally, that is to say, with Charles E. Loney, Mary A. Loney, James T. Jolly, Effie A. Jolly, Clinton E. Perkins, Frank J. Bonney, Charles S. Myers, and Jan-

nie Myers, severally, and with divers other persons who are to the complainant unknown, but whose names, when the same shall be discovered, the complainant prays leave to add to this bill by proper amendment, and to seek appropriate relief in respect of the lands by them fraudulently obtained from the complainant; that, in and by the said unlawful contracts, agreements, arrangements and understandings so as aforesaid made by the said defendants with the said other persons, each of the said other persons severally agreed and arranged with the said defendants or with some of them that he or she would make an entry and purchase of a tract of the public land of the United States under and in pretended and apparent accordance with the aforesaid act of Congress approved on June 3, 1878, as amended on August 4, 1892, and would, upon obtaining title to the said tract from the United States, convey the said title and tract to the defendants or to some of them; and the said defendants, or some of them, acting for all, agreed, contracted and arranged that they would pay to each of the said other persons a [13] certain sum of money for the tract of land by him or her so to be entered and by way of recompense to such person for his or her costs, labor and trouble incurred in acquiring title to the said tract from the United States; and the said defendants further agreed and promised to furnish and advance to each of the said other persons so much money as might be necessary to enable him or her to pay for such land and to defray the other expenses incident to the obtaining of title to such

land from the United States.

VIII. That thereupon, that is to say, at divers times after the making by the said defendants as aforesaid of the unlawful, corrupt and fraudulent agreements, contracts, arrangements and understandings with the said Charles E. Loney, Mary A. Loney, James T. Jolly, Effie A. Jolly, Clinton E. Perkins, Frank J. Bonney, Charles S. Myers and Jannie Myers, named in the last paragraph hereof, the said defendants, in pursuance and execution of the aforesaid unlawful and fraudulent conspiracy, and to effect the aforesaid unlawful purposes thereof, and in accordance with and in pursuance of the mode, scheme, method and means hereinbefore set out and stated to have been by them mutually agreed upon, designed and contemplated, and in pursuance of and in accordance with the said unlawful, corrupt and fraudulent agreement, stated in the last preceding paragraph hereof to have been made and entered into by and between the said defendants and the said other persons, named in the said last paragraph, did, at divers times, unlawfully, corruptly and fraudulently cause, induce and procure the said Charles E. Loney, Mary A. Loney, James T. Jolly, Effie A. Jolly, Clinton E. Perkins, [14] Frank J. Bonney, Charles S. Myers and Jannie Myers, severally, to apply at the said land office of the United States located at Lewiston in the State of Idaho to purchase a tract of public land, then the property of the complainant, under the provisions of the aforesaid act of Congress approved on June 3, 1878, as amended by the act of Congress approved

on August 4, 1892, and in pretended and apparent accordance with the provisions and requirements of the said acts, the said defendants then and at all times thereafter well knowing that the said applications so made by the said other persons, and the entries so by the said other persons sought and intended to be made, were and would be false, fraudulent, illegal and invalid by reason of the fact, hereinbefore stated, that each of the said applications was made and each of the said entries was sought and intended to be made in accordance with and in pursuance of an unlawful, corrupt and fraudulent agreement, theretofore as aforesaid made and then and thereafter subsisting, whereby the person so applying and seeking to enter each tract had agreed to sell to the said defendants such tract upon the acquisition by him from the United States of title thereto and the said defendants had agreed to buy the said tract and the said title.

IX. And the said defendants hereinbefore named, in further pursuance of the aforesaid conspiracy, and further to effect the said unlawful purposes thereof, and further in pursuance of, and in accordance with the said scheme, mode, method and means theretofore as aforesaid by them mutually agreed upon, designed and contemplated, [15] and in further pursuance of, and further in accordance with the unlawful, corrupt and fraudulent agreements theretofore as aforesaid made by them with the said Charles E. Loney, Mary A. Loney, James T. Jolly, Effie A. Jolly, Clinton E. Perkins, Frank J. Bonney, Charles S. Myers, Jannie Myers,

hereinbefore named, did also, at divers times, cause, induce and procure the said Charles E. Loney, Mary A. Loney, James T. Jolly, Effie A. Jolly, Clinton E. Perkins, Frank J. Bonney, Charles S. Myers, Jan-nie Myers and each of them, severally to appear before the officers of the aforesaid land office and each of them in connection with and as a part of his or her application to purchase a tract sought to be by him or her entered, to make, subscribe, make oath to and file in the said land office, a written statement of the character, substance, tenor and purport prescribed by the aforesaid statute to be filed by persons desiring to avail themselves of the provisions thereof, and did cause, induce and procure the said persons, and each of them, then and there to make and subscribe their respective written statements as aforesaid, and to state respectively in substance that he or she, the applicant, did not apply to purchase the land described in his or her statement, on speculation, but in good faith to appropriate it to his or her own exclusive use and benefit, and that he or she had not made any agreement or contract, directly or indirectly, or in any way or manner with any person or persons whomsoever by which the title which he might acquire from the Government of the United States might inure in whole or in part to the benefit of any person except himself; which said respective applications and each of them were then and there duly filed in the said United States [16] land office.

X. And the said defendants heretofore named, in further pursuance of the aforesaid conspiracy,

and further to effect the said unlawful purposes thereof, and further in pursuance of and in accordance with the said scheme, mode, method and means theretofore as aforesaid by them mutually agreed upon, designed and contemplated, did also at divers times furnish and advance to divers and several of the said other persons hereinbefore named, and stated to have been induced and procured by the said defendants to make unlawful and fraudulent entries of public lands, divers and considerable sums of money for the purpose of enabling such other persons to purchase and pay for the lands by them respectively sought to be entered and upon the agreement and with the understanding made and had with each of such persons that the money so furnished was by way of advancement upon the purchase price theretofore agreed to be paid to such person by the said defendants for the land to be entered and acquired by such person and was to be applied by such person to the purchase of, and the payment for, the tract by him to be entered, the said defendants then and at all times thereafter, designing, intending and expecting that each of the said persons so receiving such sums of money should and would, when he or she should be questioned upon the subject by the officers of the aforesaid land office, deny and conceal from the said officers the fact that he or she had received such money from the said defendants, and should and would, in answer to the interrogatories to be propounded by the said officers, falsely and fraudulently state, on his or her oath, in writing, that he or she had [17] obtained

the said money from other persons or by other means, for the purpose and to the end that the said officers and other officers of the United States concerned and charged with the administration of the laws governing the disposal of the public lands might and should thereby be deceived, imposed upon and fraudulently misled, and so prevented from further inquiry, investigation and consideration concerning such entries, whereby the truth and the facts hereinbefore stated might be discovered and the fraudulent character of the several transactions disclosed, and that the said officers might and should thereby be fraudulently and mistakenly caused to believe that such entries were lawful and honest and so to be induced to approve the said entries and to cause patents to be issued thereon, conveying to the several said persons the tracts by them respectively entered.

XI. That thereafter, pursuant to the said unlawful and corrupt conspiracy, combination, confederation and agreement, and in furtherance thereof and to carry out and effect the object and purpose thereof, the said defendants hereinbefore named did induce and procure the said other persons hereinbefore named, and each of them, to appear before the said officers of the said land office of the United States at Lewiston, Idaho, and to answer the certain interrogatories hereinbefore *before in the complaint* set out, prescribed by the commissioner of the General Land Office, pursuant to the authority contained in the act aforesaid; and each of the said persons then and there by the procurement of the said

William F. Kettenbach, George H. Kester and William Dwyer did answer such questions in substance and to the effect that he or she had not sold or transferred his or her claim to the land [18] for which he or she made application to purchase since making his or her sworn statement, or had directly or indirectly made any agreement or contract in any way or manner with any person whomsoever by which the title which he or she might acquire from the Government of the United States might inure in whole or in part to the benefit of any person except himself or herself, and that he or she made his or her entry in good faith for the appropriation of the land exclusively to his or her own use and not for the use or benefit of any other person, that no other person than himself or herself, nor any firm, corporation or association had any interest in the entry which he or she was then making, or in the land or in the timber thereon, that he paid out of his or her own individual funds all the expenses in connection with making said filings and entry and that he expected to pay for the land with his or her own money, the said person so answering being in so doing guilty of false and fraudulent swearing, and intending to deceive and impose upon, and actually deceiving and imposing upon the said officers of the said land office and the answers so made by such persons being false and fraudulent, in this, that the said persons had, in truth and in fact, theretofore severally agreed and contracted, as aforesaid, with the said defendants hereinbefore named to sell to the said defendants the titles by the said other

persons sought to be acquired, and had made agreements whereby such titles should inure to the benefit of the said defendants, and did not make the said entries in good faith for the appropriation of the lands by them severally sought to be entered to their own exclusive use, respectively, and did not severally pay out of their own individual and respective funds all the expenses in connection with the [19] said filings and entries, and did not severally expect to pay for the land by them respectively entered with their own moneys, and the said answers being in divers other respects and particulars false, fraudulent, untrue and deceitful, and being intended to deceive, defraud and mislead, and actually deceiving, defrauding and misleading, the said officers of the said land office and other officers of the United States charged with and concerned in the administration of the laws providing for the disposal of the public lands of the United States.

XII. That at the divers and several times hereinbefore referred to, the said Charles E. Loney and the other persons hereinbefore named and stated to have made and entered into certain unlawful, corrupt and illegal agreements, arrangements and understandings with the said defendants hereinbefore named, severally did apply to enter, and did make entries of divers tracts of public land of the United States subject to disposal at the aforesaid land office, and each of the said persons did consequently and in the usual course of administration of the public laws obtain from the United States a patent whereby the United States conveyed to each of the

said persons, severally the tracts by him or her entered, that is to say, that the said Charles E. Loney did on April 3, 1906, make application to enter, and on June 19, 1906, made entry of, and on September 11, 1907, obtained a patent conveying to him, lot four and the southwest quarter of the northwest quarter, and the north half of the southwest quarter of section four, in township thirty-six north of range five east of Boise meridian; [20] and the said

Mary A. Loney did on March 23, 1906, make application to enter, and on ——— made entry of, and on September 19, 1907, obtained a patent conveying to her, the northeast quarter of the northeast quarter of section eighteen and the west half of the northwest quarter, and the northwest quarter of the southwest quarter of section seventeen in township thirty-six north of range five east of the Boise meridian; and the said

Frank J. Bonney did on June 30, 1906, make application to enter, and on October 11, 1906, made entry of, and on December 28, 1907, obtained a patent conveying to him, the northwest quarter of the southwest quarter of section thirty-four in township thirty-seven north of range five east, and the east half of the southeast quarter of section thirty-three in township thirty-seven north of range five east, and lot one of section four in township thirty-six north of range five east, all of Boise meridian; and the said

James T. Jolly did on April 3, 1906, make application to enter, and on June 19, 1906, made entry of, and on September 11, 1907, obtained a patent con-

veying to him, the south half of the northeast quarter, and the east half of the southeast quarter of section four in township thirty-six north of range five east of Boise meridian; and the said

Effie A. Jolly did on March 23, 1906, make application to enter and on June 12, 1906, made entry of, and on June 3, 1909, obtained a patent conveying to her, the east [21] half of the northwest quarter and the north half of the northeast quarter of section seventeen in township thirty-six, north of range five east of Boise meridian; and the said

Charles S. Myers did on September 30, 1905, make application to enter, and on January 22, 1906, made entry of and on September 11, 1907, obtained a patent conveying to him, the northwest quarter of section twenty-nine in township thirty-eight north of range six east of Boise meridian; and the said

Jannie Myers did on March 19, 1906, make application to enter, and on June 6, 1906, made entry of, and on September 11, 1907, obtained a patent conveying to her, the west half of the southwest quarter of section twenty-five, in township thirty-eight north of range five east of Boise meridian; and the said

Clinton E. Perkins did on April 18, 1906, make application to enter, and on July 12, 1906, made entry of, and on September 11, 1907, obtained a patent conveying to him, lots three and four in section three in township thirty-six north of range five east, and the south half of the southwest quarter of section thirty-four of township thirty-seven north of range five east of Boise meridian.

XIII. That each of the said persons so making entry of and obtaining title to the tract by him or her entered, did apply to make and did make such entry, and did prosecute and carry on the proceedings, at the solicitation and instigation of the said defendants, being moved and stimulated thereto by the advice, request and promises of the said defendants hereinbefore named, and therein acting upon, in pursuance of, and in accordance with, the unlawful, corrupt and fraudulent arrangement, agreement and understanding theretofore made and entered into as aforesaid [22] between him or her and the said defendants, which said agreement, arrangement and understanding continued and subsisted throughout the whole of the said proceedings, whereby it had been and was agreed that the said defendants should buy from each of the said persons, and each of the said persons should sell and convey to the said defendants, the tract and the title by him or her to be acquired from the United States.

XIV. And the complainant further avers that each of the persons mentioned in the last preceding paragraph hereof and stated to have made entries, severally, of certain tracts of public land, in connection with his or her application to make entry of such land, and as a part of the said application, and as a necessary and material step in the proceedings to obtain a patent for the land by him or her sought to be entered, did file in the said land office a written statement, of the character, substance, tenor and purport prescribed by the Act of Congress aforesaid, wherein such person did, on his or her oath, falsely,

fraudulently and deceitfully swear in substance that he or she was not applying to purchase the tract of land by him or her sought to be entered on speculation, but in good faith to appropriate the same to his or her own exclusive use and benefit, and that he or she had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he or she should acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself or herself, whereas in truth and in fact each of the said persons was applying to enter the tract by him [23] or her sought to be entered upon speculation, and not for his or her own exclusive use and benefit, and had made an unlawful and fraudulent agreement with the said defendants herein before named, as aforesaid, whereby the title by him or her to be acquired should inure to the use and benefit of the said defendants, and the said statements so made by the said persons and each of them were known by the said persons and by each of them, and were known by the said defendants, to be false, untrue, fraudulent and deceitful.

XV. And the complainant further avers that each of the said persons hereinbefore named and stated to have made the entries hereinbefore mentioned and designated, did, in the course of the said proceedings had and prosecuted by them as aforesaid, appear before the said officers of the aforesaid land office and did, on his or her oath in writing, make answers to the several interrogatories which

had been as aforesaid prescribed by the Commissioner of the General Land Office to be propounded to the person seeking to make entries under the aforesaid act of Congress, which said interrogatories are hereinbefore set out, and which were propounded to each of the said persons; and in so making answer to the said interrogatories, each of the said persons did, upon his or her oath in writing, falsely, fraudulently and deceitfully declare and swear that he or she had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself or herself, and that he or she was so making the entry by him or her offered to be made in [24] good faith for the appropriation of the land sought to be entered exclusively to his or her own use and not for the use or benefit of any other person, and that no other person than the said person so offering to enter, and no firm, corporation or association, had any interest in the said entry or in the land sought to be entered or in the timber standing upon the said land, whereas in truth and in fact each of the said persons had, as aforesaid, theretofore made and entered into the agreement hereinbefore stated with the said defendants, which agreement was then still continuing and subsisting, whereby each of the said persons so seeking to make entry had agreed to sell the land by him to be entered to the said defendants or some of them, and the title to be acquired by each of said persons

was to inure to the benefit of the said defendants, and the said answers so made by the said persons to the said interrogatories were by the said persons and by the defendants known to be false and fraudulent.

XVI. And the complainant further avers that several of the said persons named in the seventh paragraph hereof and therein stated severally to have made entries of divers tracts of public land, did, before the time they appeared at the aforesaid land office to make the proof required by the statute aforesaid and to answer the interrogatories hereinbefore mentioned as required to be answered by them, receive and accept from the said defendants hereinbefore named or some of them, certain sums of money, which sums were furnished and advanced to the said persons by the said defendants or some of them, in pursuance of and in accordance with the fraudulent and unlawful agreements and arrangements hereinbefore stated [25] and alleged to have been made between the said defendants and the said other persons, whereby the said defendants were to advance to the said other persons such money as should be necessary to enable such other persons to pay for and purchase the several tracts by such other persons respectively to be entered and purchased; and the said sums of money were by the said defendants furnished, and by the said other persons received and accepted, for the purpose of enabling the said other persons to make entries of, and to pay for, the several tracts of public land intended to be entered by such other persons, and upon a mutual agreement and understanding in each case that such

money was to be used and applied by the recipient thereof; and the said persons so receiving the said sums of money did use the same for the purpose aforesaid, and each of the said persons did, in making his or her entry, pay to the officers of the said land office the purchase price required by law to be paid for the land entered and purchased by such person, and did pay the other expenses by him or her incurred in the said proceeding, with the said money obtained and derived from the said defendants, or some of them, and not with money belonging to the persons making the entry or derived and obtained from other persons than the defendants. Nevertheless, each of the said persons, who had as aforesaid received the said sums of money from the said defendants, when he or she appeared at the said land office to make such proofs and to answer such interrogatories as have hereinbefore been mentioned and stated, did, in answer to those of the said interrogatories relating to the subject, on his or her oath, in writing, falsely, fraudulently and deceitfully swear and declare, in substance, that he or [26] she intended to pay and was about to pay the purchase price required by law as aforesaid out of funds and with money belonging to him or her, and being his or her individual property, and did untruly, falsely, and deceitfully state and represent that he or she had obtained such money from other persons and other sources than the said defendants.

Wherefore, and by reason of the said false, fraudulent and deceitful representations so made by the said persons seeking to make entries of the said

lands, the officers of the United States concerned in the proceedings were deceived and imposed upon, and were caused to believe that the entries so offered to be made were honest and valid entries; whereas, had the said officers been by the said other persons truly informed and apprised of the fact that the several sums of money so paid for the purchase of the said lands were the property of the defendants in this case and had been advanced as aforesaid by the said defendants, the said officers would have been caused to make, and it would have been their duty to make, further inquiry and investigation concerning the said proposed entries and the transactions connected therewith, and to give further consideration to the said entries and transactions, with the result that the facts hereinbefore stated would have been discovered, the fraudulent character of the several transactions hereinbefore set forth would have been discovered, and the making of the illegal, invalid and fraudulent entries sought by the said defendants and the said other persons to be made would have been prevented. [27]

XVII. And the complainant further avers that, by reason of the facts hereinbefore stated, and by reason of the unlawful conspiracy among the said defendants hereinbefore named, the unlawful agreements between the said defendants and the other persons who made the entries herein enumerated and designated, the perjury procured by the said defendants and committed by the said other persons in the procurement of the said entries, and false swearing, misrepresentations and concealment of material facts

committed and practiced by the said persons, and of the other matters which are hereinbefore set out, the said entries, and each of them were unlawfully made, and were and are illegal, fraudulent and invalid, and that the United States was and is defrauded thereby; and that, by reason of the said facts, the officers of the United States, charged with the administration of the laws providing for and governing the disposal of the public lands, and concerned in the transactions herein stated, were deceived, defrauded, misled and imposed upon, and caused to allow the said entries to be made, and induced to approve the said entries and to issue patents thereon; and that the said patents, by reason of the said facts, are invalid, and are voidable at the suit of the United States, as having been procured by fraud, perjury, misrepresentation and imposition and in violation of law, and having been issued and granted under fraudulent imposition and mistake of fact, and in fraud of the United States.

XVIII. And complainant further avers and charges that the said defendants, William F. Kettenbach, George H. Kester and William Dwyer by their aforesaid several unlawful, corrupt and fraudulent schemes and practices, and by and through the various persons heretofore, in this bill [28] of complaint, mentioned as employed by them for that purpose, fraudulently obtained and procured the patents of complainant to be issued to the various persons hereinbefore in this bill of complaint mentioned in connection with the several descriptions of said lands mentioned and set out. And your complainant fur-

ther avers and charges that the said pretended patents to the lands heretofore described were procured, as the defendants William F. Kettenbach, George H. Kester and William Dwyer and each of them, well knew at the time of procuring the same, in violation of the laws of the United States. And your complainant further avers and charges that in the case of each and every of such tracts of land in this bill of complaint described, the acts and conduct of the said defendants, William F. Kettenbach, George H. Kester and William Dwyer, and each of them, and each and every of their employees and confederates, were illegal and fraudulent, and that the patents procured from this complainant by and on behalf of said defendants, were and are, in each and every instance, fraudulent, invalid and voidable as against this complainant, and contrary to equity and good conscience, and being so, and the titles purporting to be conveyed thereby being vested in certain of the said defendants, the said patents ought to be vacated, set aside, voided and for naught held.

XIX. And the complainant avers and charges that the patents so unlawfully and fraudulently procured from the complainant by and on behalf of the said defendants William F. Kettenbach, George H. Kester and William Dwyer, for the several tracts of land in this bill of complaint mentioned and described were issued by this complainant in each and every instance, within six years of the filing of this [29] bill of complaint.

XX. Complainant further avers and charges that, pursuant to said unlawful and corrupt combination,

conspiracy and agreement, hereinbefore alleged and set forth and to effect the object and purpose thereof, the said William F. Kettenbach, George H. Kester and William Dwyer did induce the said several other persons hereinbefore named in connection with the description of the said several tracts of land to convey the same, in some instances to George H. Kester, in some instances to George H. Kester and William F. Kettenbach, or George H. Kester and W. F. Kettenbach; but complainant avers that in each and every instance such conveyances were executed for the benefit of the said defendants, William F. Kettenbach, George H. Kester and William Dwyer, or either or all of them and other person or persons unknown to the complainant, pursuant to the unlawful agreement hereinbefore alleged and set forth; and that, by means of such conveyances from the said several other persons to whom the patents of the United States were issued, the several titles purporting to be issued by the United States and conveyed to the said patentees are now vested in certain of the said defendants William F. Kettenbach, George H. Kester, and William Dwyer. Forasmuch, therefore, as the complainant has been cheated and defrauded of its public lands and is remediless at and by the strict rules of the common law, and is only relievable in a court of equity wherein such matters are fully cognizable and reviewable; and to the end that the said William F. Kettenbach, George H. Kester and William Dwyer may full, true, direct and certain answers make, according to the best of [30] their knowledge, information and belief, to all and

singular the matters and charges aforesaid, but not on oath, their answer on oath being hereby expressly waived, your complainant prays as follows:

That all of the said defendants hereinbefore in this bill named and the several persons hereinbefore named in connection with the description of said lands, may be held, adjudged and decreed to have defrauded the complainant of the lands and each and every description thereof hereinbefore set forth as patented by complainant to the several persons hereinbefore named, and that by reason of such fraud, the patents issued to them, or either of them, or to others in their behalf, be declared void, as such, be held for naught and set aside, and the said lands restored to the public domain of the complainant; and the said defendants, and each of them, be held to pay to the Treasurer of complainant, all such reasonable sums of money as it may have found necessary to lay out and expend in and about discovering and establishing the fraud as is hereinbefore set forth and charged, that this complainant may have all such further relief in the premises as may be conformable to equity and good conscience, and such as seems proper to this Honorable Court.

GEORGE W. WICKERSHAM,
Attorney General of the United States,
Solicitor for Complainant.

[Endorsed]: Filed September 4, 1909. A. L. Richardson, Clerk. [31]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER, and WILLIAM DWYER,
Defendants.

Demurrer to Bill in Equity.

To the Honorable Judges of the Circuit Court of the
United States for the District of Idaho:

Come now the defendants above named, and
demurrers to the bill in equity on file herein, and for
cause of demurrer allege:

1.

That said bill in equity does not state facts suffi-
cient to constitute a cause of action.

2.

That said bill in equity does not state facts suffi-
cient to confer jurisdiction on the above-entitled
court to hear and determine the matter attempted
to be raised and pleaded therein, and the said bill
does not state facts sufficient to show that the above-
entitled court has jurisdiction over any of the subject
matter contained or pleaded therein, or jurisdiction
to hear and determine the same.

3.

That said bill is indefinite, unintelligible, and un-
certain, and that such uncertainty consists in this,
to wit: That it does not appear therein in what way
or manner the said defendants acted, or what overt

acts were [32] committed by either of said defendants in procuring title to said tract of land, or any part thereof, or the manner in which the said land was acquired.

4.

That said bill in equity is further indefinite, unintelligible, ambiguous and uncertain, and that such uncertainty consists in this, to wit: That it does not appear therefrom whether or not the said alleged agreements or either thereof were made prior to the filing of the sworn statements of the various entrymen or subsequent to the filing of the sworn statement or prior to the making of final proof, and it does not appear therefrom that the said tracts of land, or either thereof at the date of filing of the bill in equity herein stood of record in the names of said defendants or either thereof.

5.

That said bill in equity as a whole does not state facts sufficient to constitute a cause of action against these defendants or either thereof.

GEO. W. TANNAHILL,

Solicitor for Defendants, William F. Kettenbach,
George H. Kester, and William Dwyer, Residing at Lewiston, Idaho.

State of Idaho,

County of Nez Perce,—ss.

Geo. W. Tannahill, being duly sworn, says that he is the solicitor for the defendants above named, and that said demurrer is made in good faith, and not for the purpose of delay, and is, as affiant verily believes,

well founded in point of law.

GEO. W. TANNAHILL.

Subscribed and sworn to before me this 5th day of October, A. D. 1909.

[N. P. Seal] SAMUEL O. TANNAHILL,
Notary Public in and for Nez Perce County, State
of Idaho. [33]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER, and WILLIAM DWYER,
Defendants.

Affidavit of Service of Demurrer to Bill in Equity.

State of Idaho,
County of Nez Perce,—ss.

Geo. W. Tannahill, being duly sworn, deposes and says that he is an attorney-at-law, and is the attorney of record for the above-named defendants in the above-entitled action, and that he resides in the city of Lewiston, Nez Perce County, State of Idaho:

That C. H. Lingenfelter is the United States District Attorney for the District of Idaho, and by virtue thereof, attorney for the United States of America, the plaintiff in said cause;

That he, the said C. H. Lingenfelter, resides at the city of Boise, County of Ada, State of Idaho; that

in each of said two places there is a United States postoffice, and between said two places there is a regular communication by mail;

That on the 5th day of October, A. D. 1909, deponent served a true copy of the foregoing Demurrer to Bill in Equity on file herein on the said C. H. Lingenfelter, the said attorney for said plaintiff, by depositing such copy of Demurrer to Bill in Equity on said date in the postoffice at said city of Lewiston as aforesaid, properly enclosed in an envelope addressed to the said C. H. Lingenfelter, United States District Attorney at the city of Boise, County of Ada, State of Idaho, his said place of residence, and prepaying the postage thereon.

GEO. W. TANNAHILL.

Subscribed and sworn to before me this 5th day of October, A. D. 1909.

[N. P. Seal] SAMUEL O. TANNAHILL,
Notary Public in and for Nez Perce County, State of Idaho.

[Endorsed]: No. 407. Filed October 9th, 1909.
A. L. Richardson, Clerk. [34]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER, and WILLIAM DWYER.

**Notice of Motion to Strike [Certain Portions from
Bill in Equity].**

NOTICE OF MOTION TO STRIKE.

To the Plaintiff Above Named, and to GEORGE W.
WICKERSHAM, Attorney General of the
United States of America, and by Virtue
Thereof, Attorney for Plaintiff:

TAKE NOTICE, that on the first day of the next
regular term of the above-entitled court, the same
being the 25th day of October, A. D. 1909, at the
courtroom of the said court at Moscow, Latah
County, Idaho, at ten o'clock A. M. of said day, the
defendants herein will move the above-entitled Court
to strike out of and from the bill in equity heretofore
served and filed herein the parts and portions
thereof set out and specifically described in the an-
nexed motion to strike, which is hereby referred to.

Upon the argument of said motion, there will be
used the bill in equity on file herein, the defendants'
motion to strike, and all files and records in the ac-
tion.

GEO. W. TANNAHILL,

Solicitor for Defendants, Residing at Lewiston,
Idaho. [35]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEO. H. KES-
TER, and WILLIAM DWYER,
Defendants.

**Motion to Strike [Certain Portions from Bill in
Equity].**

MOTION TO STRIKE.

To the Honorable, the Judges of the Circuit Court of
the United States for the District of Idaho:

Comes now the defendants herein, and moves the
Court to strike out of and from the bill in equity on
file herein the following portions:

1.

All of paragraph two thereof, upon the ground
that the same is redundant, surplusage, irrelevant
and immaterial.

2.

All of paragraph five thereof, upon the ground
that the same is redundant, surplusage, irrelevant
and immaterial.

3.

Strike out all that portion of the prayer of said
bill in equity beginning with the word "and," the
same being the second word in line four from the top
of the last page of said bill, and ending with the word
"expended," the same being the last word in line six
from the top of the last page of said bill; also all that

portion of the prayer of said bill in equity beginning with the word "in," the same being the first word in line seven from the top of the last page of said bill, and ending with [36] the word "charge," the same being the fifth word in line eight from the top of the last page of said bill, upon the ground that the same is redundant, surplusage, irrelevant and immaterial.

Upon the argument of said motion there will be used the bill in equity heretofore served and filed herein, the defendants' demurrer, and notice of motion, and all of the files and records in the action.

GEO. W. TANNAHILL,

Solicitor for Defendants, Residing at Lewiston,
Idaho.

State of Idaho,

County of Nez Perce,—ss.

Geo. W. Tannahill, being duly sworn, upon oath says, that he is the solicitor for the defendants above named, and that the foregoing motion to strike is made in good faith, and not for the purpose of delay, and is, as affiant verily believes, well founded in point of law.

GEO. W. TANNAHILL.

Subscribed and sworn to before me this 5th day of October, A. D. 1909.

[N. P. Seal] SAMUEL O. TANNAHILL,
Notary Public in and for Nez Perce County, State
of Idaho. [37]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

THE UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.

KESTER, and WILLIAM DWYER,

Defendants.

**Affidavit of Service of Motion to Strike [Certain
Portions of Bill in Equity].**

AFFIDAVIT OF SERVICE OF MOTION TO
STRIKE.

State of Idaho,

County of Nez Perce,—ss.

Geo. W. Tannahill, being duly sworn, deposes and says that he is an attorney-at-law, and is the attorney of record for the above-named defendants in the above-entitled action, and that he resides in the city of Lewiston, Nez Perce County, State of Idaho;

That C. H. Lingenfelter is the United States District Attorney for the District of Idaho, and by virtue thereof, attorney for the United States of America, the plaintiff in said cause;

That he, the said C. H. Lingenfelter, resides at the city of Boise, County of Ada, State of Idaho; that in each of said two places there is a United States post-office, and between said two places there is a regular communication by mail;

That on the 5th day of October, A. D. 1909, deponent served a true copy of the foregoing Notice of Mo-

tion and motion to strike certain portions of the bill in equity on file herein on the said C. H. Lingenfelter, the said attorney for said plaintiff, by depositing such copy of notice of motion and motion on said date in the postoffice at said city of Lewiston aforesaid, properly enclosed in an envelope, addressed to the said C. H. Lingenfelter, United States District to-torney of the city of Boise, County of Ada, State of Idaho, his said place of residence, and prepaying the postage thereon.

GEO. W. TANNAHILL.

Subscribed and sworn to before me this 5th day of October, A. D. 1909.

[N. P. Seal] SAMUEL O. TANNAHILL,
Notary Public in and for Nez Perce County, State
of Idaho.

[Endorsed]: No. 407. Filed October 9, 1909. A.
L. Richardson, Clerk. [38]

**[Marshal's Return of Service of] Subpoena Ad
Respondendum.**

I hereby certify that I received the within Subpoena Ad Respondendum, together with three duplicate copies, and certified copies of complaint, at Moscow, Latah County, Idaho, on the 20th day of Sept., 1909, and served the same upon William F. Kettenbach, by handing to and leaving with the said William F. Kettenbach, a duplicate copy of the within Subpoena Ad Respondendum, together with a certified copy of complaint, personally, at Lewiston, Nez Perce County, Idaho, on the 23d day of Sept., 1909.

Served the same upon William Dwyer, by handing

to and leaving with the said William Dwyer, a duplicate copy of the within Subpoena Ad Respondendum, together with a certified copy of complaint, personally at Lewiston, Nez Perce County, Idaho, on the 23d day of Sept., 1909. And after due search and diligent inquiry, I am unable to find the defendant Geo. H. Kester within the District of Idaho.

Moscow, Idaho, Oct. 2d, 1909.

S. L. HODGIN,
U. S. Marshal,
By J. E. Greene,
Deputy.

I hereby certify that I served the within subpoena ad respondendum upon George H. Kester, one of the defendants named therein, at Moscow, Latah County, Idaho, on October 26, 1909, by handing to and leaving with the said George H. Kester, personally, a duplicate of the within subpoena ad respondendum, together with a certified copy of the complaint.

Moscow, Idaho, Oct. 27th, 1909.

S. L. HODGIN,
U. S. Marshal.
By Jno. Jackson,
Deputy. [39]

*In the Circuit Court of the United States for the
Northern Division of the District of Idaho.*

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER, and WILLIAM DWYER,
Defendants.

Subpoena Ad Respondendum.

The President of the United States of America, to
William F. Kettenbach, George H. Kester and
William Dwyer, Greeting:

You and each of you are hereby commanded that
you be and appear in said Circuit Court of the
United States, at the courtroom thereof, in Moscow
in said district, on the first Monday of November
next, which will be the first day of November, A. D.
1909, to answer the exigency of a Bill of Complaint
exhibited and filed against you in our said court,
wherein The United States of America is complain-
ant and you are defendants, and further to do and
receive what our said Circuit Court shall consider in
this behalf, and this you are in no wise to omit under
the pains and penalties of what may befall thereon.

And this is to COMMAND you, the MARSHAL of
said District, or your DEPUTY, to make due service
of this our WRIT OF SUBPOENA and to have
then and there the same.

Hereof fail not.

Witness the Honorable MELVILLE W. FUL-

LER, Chief Justice of the Supreme Court of the United States, and the Seal of our said Circuit Court affixed at Boise in said District, this 17th day of September in the year of our Lord One Thousand Nine Hundred and nine and of the Independence of the United States the One Hundred and thirty-fourth.

A. L. RICHARDSON,

Clerk.

[Endorsed]: Filed Nov. 29, 1909. A. L. Richardson, Clerk. [40]

In the Circuit Court of the United States for the Northern Division of the District of Idaho.

No. 407.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.

KESTER, and WILLIAM DWYER,

Defendants.

Exceptions to Bill in Equity.

To the Honorable, the Justices of the Circuit Court of the United States for the District of Idaho:

The defendants herein, William F. Kettenbach, George H. Kester, and William Dwyer, by leave of Court first had and obtained, file this their exceptions to the bill in equity filed herein September 17, A. D. 1909, as follows:

1.

For that the allegations in the first paragraph of said bill beginning with the word "that," the same

being the first word in line 7 from the top of page 2, and ending with the word "office," the same being the last word of paragraph one, and the last word in line three from the top of page 3, upon the ground and for the reason that the same is impertinent and should be expunged.

2.

For that the allegations in the second paragraph of said bill in equity beginning with the word "that," the same being the first word in line one of said paragraph 2, and ending with the word "possession," the same being the last word in paragraph 2, as follows:

"That pursuant to the authority given by said [41] act, the Commissioner of the General Land Office prescribed and promulgated certain regulations to give effect to the provisions of said act, among others, the following:

"That after the expiration of the 60 days' publication, the person desiring to purchase the land described in his application to purchase should, under oath, make answer to certain questions as follows:

'Have you sold or transferred your claims to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract in any way or manner, with any person whomsoever, by which the title which you may acquire from the Government of the United States, may inure, in whole or in part to the benefit of any person except yourself?'

And

'Do you make this entry in good faith for the appropriation of the land exclusively to your

own use and not for the use or benefit of any other person?’

And

‘Has any other person than yourself, or has any firm, corporation, or association, any interest in the entry you are now making, or in the land, or in the timber thereon?’

Also the following:

‘Did you pay, out of your own individual funds, all the expenses in connection with making this filing, and do you expect to pay for the land with your own money?’

And

‘Where did you get the money with which to pay for this land and how long have you had the same in your actual possession?’ ”

upon the ground and for the reason that the same is impertinent, and should be expunged.

3.

For that the allegations in paragraph five of said bill in equity beginning with the word “that,” the same being the first word in line one from the top of page 8, and ending with the word “them,” the same being [42] the last word in line three from the top of page 10, and the last word in paragraph 5, upon the ground that the same is impertinent, and should be expunged.

4.

For that the allegations in the 8th paragraph of said Bill in Equity, beginning with the word “that,” the same being the first word in line one of paragraph eight, and ending with the word “title,” the same be-

ing the last word in paragraph 8, and the last word in line two from the top of page 14, upon the ground that the same is impertinent, and should be expunged.

5.

For that the allegations contained in said Bill beginning with the word "and," the same being the second word in line 4 from the top of the last page of said Bill, and ending with the word "charged," the same being the fifth word in the 8th line of the last page of said Bill, as follows:

"And the said defendants, and each of them be held to pay to the Treasurer of complainant, all such reasonable sums of money as it may have found necessary to lay out and expend in and about discovering and establishing the fraud as is hereinbefore set forth, and charged,"

upon the ground and for the reason that the same is impertinent and should be expunged.

GEO. W. TANNAHILL,

Solicitor for Defendants, William F. Kettenbach,
George H. Kester, and William Dwyer, Residing
at Lewiston, Idaho.

State of Idaho,

County of Nez Perce,—ss.

Geo. W. Tannahill, being duly sworn, upon oath says that he is the solicitor for the defendants named in the foregoing exception, that said exception is proposed in good faith, and not for the purpose of delay, [43] and is, as affiant verily believes, well founded in point of law.

GEO. W. TANNAHILL.

Subscribed and sworn to before me this 29th day of October, A. D. 1909.

[N. P. Seal] SAMUEL O. TANNAHILL,
Notary Public in and for Nez Perce County, State of Idaho.

[Endorsed]: Filed November 30th, 1909. A. L. Richardson, Clerk. [44]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER, WILLIAM DWYER,
Defendants.

Opinion on Exceptions and Demurrer to Bill.

PEYTON GORDON, Esq., Special Assistant to
the Attorney General, Solicitor for Com-
plainant.

GEORGE W. TANNAHILL, Esq., Solicitor
for Defendants.

DIETRICH, District Judge:

The parties in this case are practically the same as the parties in No. 388, and, in all substantial respects, the bills are similar. The demurrer interposed by the defendants presents no question not passed upon in ruling upon the demurrer in that case.

There was also filed in this case a motion to strike out certain paragraphs, similar in form to the motion

considered in No. 388, and a similar application has been made by counsel for the defendants to substitute exceptions. Considering the motion as being in the nature of exceptions to the bill, it is much narrower in its scope than the exceptions considered in No. 388, and it is therefore controlled by the principles applied in that case. [45]

Let an order be entered permitting the filing of the formal exceptions, and allowing the exceptions as to paragraphs two and five of the bill, and denying them as to other portions thereof; also overruling the demurrer, and granting to the defendants thirty days in which to answer.

Dated this 30th day of November, 1909.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed November 30th, 1909. A. L. Richardson, Clerk. [46]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

No. 407.

THE UNITED STATES

vs.

WILLIAM F. KETTENBACH et al.

**Order [on Exceptions to Bill, and Overruling
Demurrer Thereto].**

On this day was announced the decision of the Court upon the exceptions to the bill of complaint herein and upon the demurrer thereto heretofore

argued and submitted, which decision is in writing and on file in said cause, and it is ordered that the formal exceptions presented in said cause be filed, and that the same be allowed as to paragraphs two and five of said bill and denied as to the other portions thereof. It is further ordered that the demurrer to said bill of complaint be and the same is hereby overruled, and the defendants are given thirty days from this date to answer in said cause.

Dated Nov. 29, 1909. [47]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

No. 407.

THE UNITED STATES

vs.

WILLIAM F. KETTENBACH et al.

**Order [Allowing Defendants Five Days Additional
to Answer].**

On motion of Geo. W. Tannahill, Esq., solicitor for defendants, it is ordered that said defendants be given five days additional to the time fixed to answer herein.

Date Dec. 21, 1909. [48]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

THE UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER and WILLIAM DWYER,

Defendants.

Disclaimer [of William Dwyer].

The defendant, William Dwyer, now and at all times herein saving and reserving to himself all manner of benefit and advantages of exception to the many errors and insufficiencies in the complainant's bill in equity contained, says that he does not know that he, this defendant, to his knowledge or belief, ever had, or did he claim or pretend to have, nor does he now claim, any right title or interest of, in, or to the estate and premises situate in the county of Nez Perce, State of Idaho, and in complainant's bill in equity set forth, or any part thereof, and this defendant does disclaim all right, title and interest to the said estate and premises in said complainant's bill in equity mentioned, and every part thereof; and this defendant denies all unlawful combination, agreement, conspiracy and confederacy in the said bill in equity charged, without that any other matter or thing material or necessary for this defendant to make answer unto and not herein and hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief

of this defendant, all which matters and things this defendant is ready to aver, maintain and prove, as this Honorable Court may direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully [49] sustained.

WILLIAM DWYER,
Defendant.

GEO. W. TANNAHILL,
Solicitor for Defendant, Residing at Lewiston,
Idaho.

State of Idaho,
County of Nez Perce,—ss.

William Dwyer, being duly sworn, says:

That he has read the foregoing disclaimer, subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on his information or belief, and as to those matters that he believes it to be true.

WILLIAM DWYER.

Subscribed and sworn to before me this 31st day of December, 1909.

[N. P. Seal] SAMUEL O. TANNAHILL,
Notary Public in and for Nez Perce County, State of
Idaho.

[Endorsed]: Filed January 5, 1910. A. L. Richardson, Clerk. [50]

[Joint and Several Answers of William F. Kettenbach, George H. Kester and William Dwyer.]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER and WILLIAM DWYER,
Defendants.

ANSWER TO BILL IN EQUITY.

To the Honorable, the Judges of the Circuit Court of
the United States for the District of Idaho:

The joint and several answers of William F. Kettenbach, George H. Kester and William Dwyer, defendants, to the Bill in Equity of the United States of America, complainant, respectfully states:

These defendants, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill in equity contained, for answer thereto, or to so much or such parts thereof as these defendants are advised is material for them to make answer unto, answer and say:

1.

These defendants, and each thereof, deny that heretofore, to wit, on the first day of July, in the year 1902, or upon any other date, or at divers other times before or after that day, or before the making of the

several entries in complainant's bill in equity mentioned [51] or designated, in the State of Idaho, William F. Kettenbach, George H. Kester or William Dwyer, or either thereof, who are in complainant's bill in equity or in the caption of said bill named as defendants, did unlawfully or corruptly combine, conspire, confederate or agree together, or with each other, or with divers other persons, some of whom are in complainant's bill in equity named, or others of whom are to the complainant unknown, or did form, make, or enter into an unlawful, corrupt or fraudulent conspiracy, combination or agreement with each other, or with the other persons aforesaid, for the purpose or to the end of defrauding the complainant of the title or ownership of divers large tracts of public land then owned by the complainant, or lying in the district of public lands subject to entry at the land office of the United States, located at Lewiston, in the State of Idaho, or for the purpose or to the end of defrauding the complainant out of the use, occupation or possession of the said tracts of public land; or for the purpose or to the end of defrauding the United States by acquiring from the United States through or by means of the act of Congress approved on June 3, 1878, mentioned in complainant's said bill in equity, for themselves or for each of themselves, the title to large bodies of timber lands, then being public lands or the property of the United States, in area or to an amount much greater than the area and the amount which they, the said defendants, individually or collectively could lawfully or in accordance with the provisions of the said statute, acquire; or for the purpose or to the end of

defrauding the United States by causing or procuring divers or many others persons severally to make entry of or to purchase from the United States, under or in professed [52] accordance with the provisions of the said statute, divers or many tracts of the public land, then being the property of the United States, they, the said defendants, then or there, intending or designing afterwards to acquire from the said other persons, the said lands so to be entered or purchased by the said other persons, or intending or designing to cause or procure the said lands to be entered or purchased in the interest or for the ultimate benefit or advantage of themselves, the said defendants, whereby, or in or by which procurement with the intent aforesaid, the provisions of the said statute should be abused or perverted, or the true intent or purpose of the said statute should be defeated; or for the purpose of accomplishing the said ends or of defrauding the United States by divers fraudulent or unlawful means, that is to say, by means of false, fraudulent or unlawful entries to be made of the aforesaid tracts of public land at the land office aforesaid, or by means of perjury, the subornation of perjury, the procurement of false swearing, or by means of other falsehoods, false pretenses or misrepresentations, whereby the officers of the United States should be deceived or imposed upon or should be induced or procured to divest the United States of its title to the said lands or to convey the said title of the United States to divers persons not lawfully entitled thereto contrary to the laws of the United States, or for the benefit, ad-

vantage or profit of the said defendants.

2.

These defendants, and each thereof, deny that as a part of the said conspiracy or agreement so far as aforesaid made or entered into by the said defendants, in the said bill in equity named, or as a part of the said unlawful [53] or fraudulent means whereby the said unlawful purposes of the said conspiracy were to be effected, it was at the times or place aforesaid, by the said defendants mutually agreed, designed or contemplated that they, the said defendants, should persuade, employ or otherwise induce or procure a large number of other persons severally to purchase or to make entries of divers tracts of the public lands aforesaid under or in pretended or apparent accordance with the aforesaid act of Congress approved June 3, 1878, as amended by the act of Congress approved on August 4, 1892, or that before the said other persons should file the sworn statements by that statute prescribed, or should apply to enter or purchase such lands or should otherwise take any steps or initiate any proceedings to that end, or before the making of such entries or purchases, or as a means of persuading or inducing the said other persons to make such entries or purchases, the said defendants should make or enter into certain agreements, contracts or understandings with the said other persons, severally, whereby or by the terms of which agreements, contracts or understandings, the said defendants, or some of them, should agree or contract to buy of the said other persons, severally, or the said other per-

sons severally should agree or contract to sell to the said defendants, or some of them, the respective tracts so to be entered or purchased by the said other persons when or so soon as the said other persons should obtain from the United States the titles to the said tracts by them to be entered or purchased, or shortly thereafter; or that thereupon or after the making of such unlawful contracts or agreements, or while the same should subsist or continue, the said defendants should cause or procure the [54] said other persons severally to apply at the land office aforesaid to make entries or to purchase divers tracts of the said public lands in professed accordance with the statutes aforesaid, or should cause or procure each of the said persons so applying, at the time of making his application to enter, or in connection with or as a part of such application, to execute, sign, make oath to or file in the said land office a sworn statement of the character, substance, tenor or purport prescribed by the said act of Congress approved on June 3, 1878, which act is in said bill in equity mentioned, stated or in part recited, in which statement such applicant should declare or on his oath represent, among other things, that he, the said applicant, did not apply to purchase the land by him applied for on speculation, but in good faith to appropriate the same to his own exclusive use or benefit, or that he had not, directly or indirectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to

the benefit of any person except himself, the said defendants intending, designing or contemplating that each of the said other persons so to be induced to make such applications or to file such sworn statements should in doing so commit or be guilty of wilful or corrupt perjury, or should swear falsely or corruptly, or should defraud the United States or fraudulently deceive or impose upon the officers of the said land office or upon the other officers of the United States charged with the administration of the laws regulating the disposal of the public lands, inasmuch or because [55] in truth or in fact each of the said persons so to be induced to make such application should, before the making of his said application or the filing of his said sworn statement, as the said defendants intended or contemplated, have made with the said defendants or some of them the agreement or contract aforesaid, by the terms of which such persons so to make application should have agreed to sell to the defendants or to some of them, or the defendants or some of them should have agreed to buy the land or the title which such person should acquire from the United States by means of the application or entry by him to be made.

3.

These defendants, and each thereof, deny that as a further part of the said alleged conspiracy or alleged agreement so as stated and pleaded in complainant's bill in equity, or entered into by the said defendants hereinbefore named, or as a further part of the unlawful means whereby the said unlawful purposes of the said conspiracy were to be effected,

it was at the times or the places aforesaid, by the said defendants, mutually agreed, designated or contemplated that they, the said defendants, after having procured the other persons in said bill in equity mentioned, to make applications to enter the lands hereinbefore mentioned in the manner or under the circumstances aforesaid, should furnish or advance to each of the said persons so much money as should be necessary to enable such person to pay to the proper officers of the United States the amount of money prescribed by law to be paid upon the making of the entry by such person to be made, or that the sum so by the defendants advanced should be deducted from the amount agreed to be paid by [56] them to such person as the purchase price of the land by him entered, or it was further intended or contemplated by the said defendants that they should cause and procure each of the said other persons, who were to be induced to make entries as aforesaid, when such person should appear before the proper officers of the aforesaid land office to answer the interrogatories that he, the said person then applying to make entry, had paid out of his own individual funds all the expenses in connection with the filing by him made; or that he expected to pay for the land by him sought to be entered with his own money; or that the money with which he intended to pay for the said land was derived by him from other sources than the defendants, or that he had had the said money in his actual possession for a longer period than in fact he had so had the same; the said defendants mutually intending, designing or contemplating

that each of the said other persons, so to be caused and procured so to answer the said interrogatories, should in doing so commit or be guilty of wilful or corrupt false swearing, or should swear falsely or corruptly or should defraud the United States, or should fraudulently deceive or impose upon the officers of the United States concerned with the administration of the laws regulating the disposal of the public lands, inasmuch or because in truth or in fact each of the said persons so to be caused or procured to answer the said interrogatories in the manner or to the effect aforesaid should, as the said defendants intended or contemplated, before the making of such answers, have received from the said defendants or from some of them the money by him to be used in the purchase of the land sought by him to be entered, or should not pay [57] or intend or expect to pay for the said land out of his own individual funds or with his own money, or should not pay or intend or expect to pay the expenses of his filing or entry out of such funds or money, or should, moreover, swear falsely and fraudulently in respect of other matters the subject of such interrogatories.

4.

These defendants, and each thereof, deny that thereafter, that is to say, after the formation or making of the said alleged unlawful conspiracy so as aforesaid made or entered into by the said defendants hereinbefore named, or at divers times in the State of Idaho, in pursuance or execution of the said alleged conspiracy or for the purpose of effecting the said unlawful purpose thereof, the said de-

fendants, or some of them, did make or enter into fraudulent, corrupt, or unlawful contracts, agreements, arrangements or understandings with a large number of persons, severally, that is to say, with Charles E. Loney, Mary A. Loney, James T. Jolly, Effie A. Jolly, Clinton E. Perkins, Frank J. Bonney, Charles S. Meyers and Jannie Meyers, or either thereof, or severally, or with divers other persons who are to the complainant unknown, but whose names, when the same shall be discovered, the complainant prays leave to add to its bill in equity by proper amendment, and to seek appropriate relief in respect of the lands by them fraudulently obtained from the complainant; or that in or by said unlawful contracts, agreements, arrangements or understandings so as aforesaid made by the said defendants with the said other persons, each of the said other persons severally agreed or arranged with the said defendants or with some [58] of them that he or she would make an entry or purchase of a tract of the public land of the United States under or in pretended or apparent accordance with the aforesaid act of Congress approved on June 3, 1878, as amended on August 4, 1892, or would, upon obtaining title to the said tract from the United States, convey the said title or tract to the defendants or to some of them; or the said defendants, or some of them, acting for all, agreed, contracted or arranged that they would pay each of the said other persons a certain sum of money for the tract of land by him or her so to be entered, or by way of recompense to such person for his or her costs.

labor or trouble incurred in acquiring title to the said tract from the United States; or that the said defendants further agreed or promised to furnish or advance to each of the said other persons so much as might be necessary to enable him or her to pay for such land or to defray the other expenses incident to the obtaining of title to such land from the United States.

5.

These defendants, and each thereof, deny that thereupon or at all, that is to say, at divers times after the making by the said defendants as aforesaid of the unlawful, corrupt, or fraudulent agreements, contracts, arrangements or understandings with the said Charles E. Loney, Mary A. Loney, James T. Jolly, Effie A. Jolly, Clinton E. Perkins, Frank J. Bonney, Charles S. Meyers or Jannie Meyers, or either thereof, named in paragraph seven of complainant's bill in equity, the said defendants, in pursuance or execution of the aforesaid unlawful or fraudulent conspiracy, or to effect the aforesaid unlawful purposes thereof, or in accordance with or in pursuance of the mode, scheme, method or means, set out and stated in complainant's said bill in equity to have been by them mutually agreed upon, designed or [59] contemplated, or in pursuance of or in accordance with the said unlawful, corrupt or fraudulent agreement, stated in said paragraph of said complainant's bill in equity to have been made and entered into by or between the said defendants or the said other persons, named in the said paragraph, did, at divers times, unlawfully, cor-

ruptly or fraudulently cause, induce, or procure the said Charles E. Loney, Mary A. Loney, James T. Jolly, Effie A. Jolly, Clinton E. Perkins, Frank J. Bonney, Charles S. Meyers or Jannie Meyers, or either thereof, severally or at all, to apply at the said land office of the United States located at Lewiston, in the State of Idaho, to purchase a tract of public land, then the property of the complainant, under the provisions of the aforesaid act of Congress, approved on June 3, 1878, as amended by the act of Congress, approved on August 4, 1892, or in pretended or apparent accordance with the provisions or requirements of the said acts, the said defendants then or at all times thereafter well knowing that the said applications so made by the said other persons, or the entries so by the said other persons sought or intended to be made, were or would be false, fraudulent, illegal or invalid by reason of the fact stated in the said bill in equity, that each of the said applications was made or each of the said entries was sought or intended to be made in accordance with or in pursuance of an unlawful, corrupt or fraudulent agreement, theretofore, as aforesaid, made, or then or thereafter subsisting, whereby the person so applying or seeking to enter each tract had agreed to sell to the said defendants such tract upon the acquisition by him from the United States of title thereto, or the said defendants had agreed to buy the said tract or the said title. [60]

6.

These defendants, and each thereof, deny each and every allegation set forth in paragraph nine of

said bill in equity, and especially that portion thereof beginning with the word "and," the same being the first word of said paragraph nine, and ending with the word "Office," the same being the last word in said paragraph nine, and these defendants, and each thereof, deny that any unlawful, corrupt or fraudulent agreements were ever made with either of the parties therein mentioned, set out and described, or that any conspiracy was ever entered into with the said entrymen whose names are set out and described in paragraph nine of complainant's bill in equity, or at all, and deny each and every allegation contained in said paragraph nine.

7.

These defendants, and each thereof, deny each and every allegation contained in paragraph ten of the said bill in equity, and especially that portion thereof beginning with the word "and," the same being the first word in said paragraph ten, and ending with the word "entered," the same being the last word in paragraph ten, and these defendants, and each thereof, deny that any unlawful, fraudulent, or corrupt conspiracy was ever entered into or made, or any unlawful, fraudulent or corrupt agreement was ever entered into or made between themselves and the said entrymen referred to in said paragraph ten, or otherwise, at all, and deny that any of the said officers of the United States Land Office were ever misled by any misrepresentations of these defendants. or either thereof, and deny that any false or fraudulent representations were ever made to the officers of the United States Land Office by these

[61] defendants, or either thereof.

8.

These defendants, and each thereof, deny each and every allegation contained in paragraph eleven of complainant's bill in equity, and especially that portion thereof beginning with the word "that," the same being the first word in paragraph eleven, and ending with the word "United States," the same being the last word in said paragraph eleven, and these defendants especially deny that there was ever any unlawful or corrupt conspiracy, combination, confederation or agreement entered into between these defendants or with other persons, or at all, and deny that there was ever anything done by these defendants pursuant to any false, corrupt conspiracy, purpose or combination, confederation or agreement, as alleged in said paragraph eleven, or at all, and deny that any or either of these defendants procured any person to answer any questions in substance or to the effect that he or she had not sold or transferred his or her claim, or either thereof, or to make any false answers to any of the questions or interrogatories, or inquiries set out and pleaded in said paragraph eleven.

9.

These defendants, and each thereof, deny all that portion of paragraph twelve, beginning with the word "that," the same being the first word in paragraph twelve, and ending with the word "said," the same being the last word in line fourteen from the top of page eighteen of the said bill in equity, and these defendants, and each thereof, especially deny

that at divers or several times, or at all, they procured Charles E. Loney, or any other person, to make any false, unlawful or corrupt agreement, or that there was any false, [62] unlawful or illegal agreement or arrangement or understanding made with the said Charles E. Loney, or any other person, in respect of said tract of land set out and described in said paragraph twelve, and these defendants, and each thereof admit that the said entrymen made the entries as alleged in said paragraph twelve, but deny that the same were made pursuant to any false, fraudulent, or corrupt agreement, conspiracy, confederation or design.

10.

These defendants, and each thereof, deny that each of said persons so making entry of or obtaining title to the tract by him or her entered, did apply to make or did make such entry, or did prosecute or carry on the proceedings, at the solicitation or instigation of the said defendants, being moved or stimulated thereto by the advice, request or promises of the said defendants hereinbefore named, or therein acting upon, in pursuance of, or in accordance with, the unlawful, corrupt or fraudulent arrangement, agreement, or understanding theretofore made or entered into as aforesaid between him or her or the said defendants, which said agreement, arrangement, or understanding continued or subsisted throughout the whole of the said proceedings, whereby it had been or was agreed that the said defendants should buy from each of the said persons, or each of the said persons should sell or convey to

the said defendants, the tract or the title by him or her to be acquired from the United States.

11.

These defendants and each thereof deny each and every allegation of paragraph fourteen of complainant's [63] bill in equity, and especially all that portion thereof beginning with the word "and," the same being the first word in paragraph fourteen, and ending with the word "deceitful," the same being the last word in said paragraph fourteen, and these defendants, and each thereof, deny that they, or either thereof, induced either or any of said parties to swear falsely concerning the said transactions in the land office, and deny that either of said entrymen did swear falsely concerning his or her application to make entry, or concerning his or her said application to make final proof of or for the said tract of land, and deny that there was ever any contract, agreement, or understanding, either directly or indirectly, whereby the title to said tract of land should inure in whole or in part to the benefit of either of these defendants, after the same was acquired by the various entrymen.

12.

These defendants, and each thereof, deny each and every allegation contained in paragraph fifteen of the said bill in equity, and especially that portion thereof beginning with the word "and," the same being the first word in paragraph fifteen, and ending with the word "fraudulent," the same being the last word in paragraph fifteen, and these defendants, and each thereof, especially deny that either of said

entrymen made false answers to any of the interrogatories set out and referred to in said paragraph fifteen, or that these defendants, or either thereof, procured the said entrymen to make false answers to any of the interrogatories referred to therein, or at all, and these defendants deny that any agreement, understanding, or combination was ever entered [64] into with either of said entrymen, as alleged in said paragraph fifteen, or at all.

13.

These defendants, and each thereof, deny each and every allegation contained in paragraph sixteen, and especially that portion of paragraph sixteen beginning with the word "and," the same being the first word in said paragraph sixteen, and ending with the word "prevented," the same being the last word in said paragraph sixteen, and these answering defendants, and each thereof, especially deny that before either of said entrymen appeared before the land office to make proof required by statute, or to answer the interrogatories set out in complainant's bill in equity, received or accepted any sums of money for any purpose whatever, or that there was ever any understanding or agreement between the said entrymen and these defendants, or either thereof, that any sum of money should be furnished by the said defendants for the purpose of paying the purchase price of said land, or at all, and deny that there was any understanding, combination, agreement or confederation between the said entrymen and these defendants, or either thereof, whereby a purchase of said lands should be made after final

proof thereof, or after title had been acquired from the Government of the United States, and these answering defendants, and each thereof, deny that the complainant has been defrauded by the deceitful representations made by the said persons seeking to make entries of the said lands, or that the officers of the United States concerned in the proceeding were deceived or imposed upon, and deny that any fraudulent, false or deceitful representations were made by these defendants, or either thereof. [65]

14.

These answering defendants, and each thereof, deny each and all of the allegations contained in paragraph seventeen of complainant's bill in equity, and especially that portion thereof beginning with the word "and," the same being the first word in said paragraph seventeen, and ending with the word "United States," the same being the last word in said paragraph seventeen, and these defendants, and each thereof, especially deny that any unlawful conspiracy was ever made or entered into among the said defendants herein named, or the said entrymen, or either thereof, or that the officers of the United States were deceived, or the United States defrauded out of any of its timber or its lands, or that there were any misrepresentations or impositions in violation of law, or otherwise, as alleged in said paragraph seventeen of complainant's said bill in equity, or at all.

15.

These answering defendants deny each and every allegation contained in paragraph eighteen of com-

plainant's bill in equity, and especially that portion thereof beginning with the word "and," the same being the first word in said paragraph eighteen, and ending with the word "held," the same being the last word in paragraph eighteen, and these defendants and each thereof deny that there was ever any false, unlawful, corrupt or fraudulent schemes or practices, made or entered into by these defendants with the said entrymen, in the said bill in equity named, or either thereof, or that the United States was ever defrauded of any of its timber lands, either valuable or otherwise, or that said patents were procured unlawfully, or fraudulently, or are illegal, or are invalid or voidable as against the complainant, or contrary to equity or good [66] conscience, and these defendants, and each thereof deny that the complainant has any right or authority, or in equity is entitled to have the said patents or titles set aside, or vacated, or voided, or for naught held.

16.

These answering defendants, and each thereof, deny that pursuant to said or any unlawful or corrupt combination, confederacy or agreement, alleged and set forth in said bill in equity, or to effect the object or purpose thereof, the said William F. Kettenbach, George H. Kester, or William Dwyer did induce the said several other persons named in complainant's bill in equity in connection with the description of the said several tracts of land, to convey the same, in some instances to George H. Kester, in some instances to George H. Kester and William F. Kettenbach, or George H. Kester and W. F. Ket-

tenbach, or that in each or every instance such conveyances were executed for the benefit of the said defendants, William F. Kettenbach, George H. Kester, or William Dwyer, or either or all of them, or other person or persons unknown to the complainant, pursuant to the unlawful or any agreement in complainant's bill in equity alleged, or that by means of such conveyances from the said several other persons to whom the patents of the United States were issued, the several titles purporting to be issued by the United States, or conveyed to the said patentees, are now vested in certain of the said defendants, William F. Kettenbach, George H. Kester or William Dwyer, but admit that title to the said tracts of land set out and described in complainant's bill in equity is vested either in William [67] F. Kettenbach or George H. Kester, and allege that the same was purchased for value, and the purchase price paid, in due course of business, without fraud or deception, or without any corrupt or fraudulent agreement on the part of these defendants, or either thereof, and deny that the defendant, William Dwyer, has, or owns, or claims, any interest in or to the said tracts of land, or either thereof.

For a further, separate and second defense, these defendants allege:

1.

That the entrymen, Mary A. Loney, Charles E. Loney, James T. Jolly, Effie A. Jolly, Clinton E. Perkins, Frank J. Bonney, Charles S. Meyers and Jannie Meyers, were at the time of the making of their sev-

eral entries, set out and pleaded in paragraph twelve of complainant's bill in equity, citizens of the United States of America, and residents, citizens, and inhabitants of the State of Idaho, and competent to make their several Timber and Stone entries of the tracts of land involved herein and set out and specifically described in said paragraph twelve of complainant's bill in equity, on file herein.

2.

That the several entrymen herein last above referred to, upon the various dates of making their said Timber and Stone entries, to wit:

Charles E. Loney, April 3, 1906; Mary A. Loney on March 23, 1906; Frank J. Bonney on June 30, 1906; James T. Jolly on April 3, 1906; Effie A. Jolly on March 23, 1906; Charles S. Meyers on September 30, 1905; Jannie Meyers on March 19, 1906, and Clinton E. [68] Perkins on April 18, 1906, made application and filed their sworn statements for said tracts of land described therein, in good faith, for the purpose of acquiring the said land strictly in accordance with the laws of the United States, and not in violation of any part or portion thereof, either directly or indirectly, and at the time of making the said entries and filing their said sworn statements, had no contract or agreement with any person whatsoever wherein or whereby the title which they might acquire from the Government of the United States would inure in whole or in part to the benefit of any other person except themselves.

3.

That long subsequent to the time the said entrymen

made their final proof and received their certificates from the Receiver of the United States Land Office at Lewiston, Idaho, these defendants, in good faith, and for a valuable consideration, and in due course of business, purchased the said tracts of land from the said various entrymen, and paid the purchase price therefor, and received the entrymen's deed for the said tracts of land, without any notice that any contract or agreement existed between the said entrymen and any person whatsoever.

4.

That the purchase of the said various tracts was made, and the deeds thereto executed, upon the following dates, to wit:

Charles E. Loney, July 11, 1906; Mary A. Loney, February 28, 1907; Frank J. Bonney, December 20, 1906; James T. Jolly, July 11, 1906; Effie A. Jolly, February 28, 1907; Charles S. Meyers, March 21, 1906; Jannie [69] Meyers, July 11, 1906, and Clinton E. Perkins, September 4, 1906, and that the said deeds were placed of record in the office of the County Recorder of Nez Perce County, Idaho.

5.

That the defendants, George H. Kester and William F. Kettenbach made the purchase of said tracts of land, and each and every part thereof, and the defendant, William Dwyer, had and never has had any interest in or to the said tracts of land, or any part thereof, and that the said defendants, George H. Kester and William F. Kettenbach, have never transferred or conveyed the said tracts of land, or any part thereof, to any person.

THIRD.

For a further, separate and third defense, these defendants, and each thereof, allege:

1.

That the perjury, subornation of perjury and conspiracy alleged and pleaded in complainant's bill in equity, are barred by the provisions of section 1043 and 1044, Revised Statutes of the United States of America.

2.

These defendants deny all unlawful combination, confederacy or conspiracy in the said bill charged without that any other matter or thing material or necessary for these defendants to make answer unto, and not herein and hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants, all which matters and [70] things these defendants are ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAM F. KETTENBACH,
GEORGE H. KESTER,
WILLIAM DWYER,

Defendants.

GEO. W. TANNAHILL,
Solicitor for Defendants, Residing at Lewiston,
Idaho.

State of Idaho,

County of Nez Perce,—ss.

William F. Kettenbach, George H. Kester and William Dwyer, being duly sworn, depose and say:

That they have read the foregoing answer subscribed by them, and know the contents thereof, and that the same is true of their own knowledge, except as to matters which are therein stated to be on their information or belief, and as to those matters they believe it to be true.

WILLIAM F. KETTENBACH.

GEORGE H. KESTER.

WILLIAM DWYER.

Subscribed and sworn to before me this 31st day of December, 1909.

[N. P. Seal] SAMUEL O. TANNAHILL,
Notary Public in and for Nez Perce County, State of Idaho.

[Endorsed]: Filed January 5, 1910. A. L. Richardson, Clerk. [71]

[**Affidavit of Service of Answer and Disclaimer.**]

In the Circuit Court of the United States for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER, WILLIAM DWYER, CLARENCE W. ROBNETT, and FRANK W. KETTENBACH,

Defendants.

AFFIDAVIT OF SERVICE OF ANSWER AND
DISCLAIMER TO AMENDED BILL IN
EQUITY.THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER and WILLIAM DWYER,
Defendants.AFFIDAVIT OF SERVICE OF ANSWER AND
DISCLAIMER TO BILL IN EQUITY.

State of Idaho,

County of Nez Perce,—ss.

Geo. W. Tannahill, being duly sworn, deposes and says that he is an attorney at law and is the attorney of record for the above-named defendants in the above-entitled cause;

That he resides in the city of Lewiston, County of Nez Perce, State of Idaho; that Peyton Gordon is the assistant to the Attorney General of the United States, and attorney of record for the above-named plaintiff in each of the said causes of action; that the said Peyton Gordon resides in the City of Boise, County of Ada, State of Idaho;

That in each of said places there is a United States postoffice and between the two said places there is a regular communication by mail; [72]

That on the 31st day of December, A. D. 1909, deponent served a true copy of the Answer and Disclaimer to Amended Bill in Equity in the case of United States of America, Complainant, vs. William

F. Kettenbach, George H. Kester, William Dwyer, Clarence W. Robnett and Frank W. Kettenbach defendants, and a true copy of the Answer and Disclaimer to Bill in Equity in the case of United States of America, Complainant, vs. William F. Kettenbach, George H. Kester, and William Dwyer on the said Peyton Gordon, the said attorney of record of said complainant, by depositing said copies of said Answers and Disclaimers in the United States post-office at the city of Lewiston, County of Nez Perce, State of Idaho, properly enclosed in an envelope addressed to Peyton Gordon, Special Assistant to the Attorney General at the City of Boise, County of Ada, State of Idaho, his said place of residence, and prepaying the postage thereupon.

GEO. W. TANNAHILL.

Subscribed and sworn to before me this 31st day of December, A. D. 1909.

[N. P. Seal] SAMUEL O. TANNAHILL,
Notary Public in and for Nez Perce County, State of Idaho.

[Endorsed]: No. 407. Filed January 5th, 1910.
A. L. Richardson, Clerk. [73]

In the Circuit Court of the United States for the District of Idaho, Northern Division.

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER and WILLIAM DWYER,
Defendants.

Replication to Answer.

Replication of complainant, in the above-entitled cause, to the answer of William K. Kettenbach, George H. Kester and William Dwyer, defendants.

This replicant, saving and reserving to itself all advantage of exception to the manifold insufficiencies, errors and uncertainties of the answer of the said defendants, William F. Kettenbach, George H. Kester, and William Dwyer, for replication thereto, says: That it will aver, maintain and prove its said bill of complaint to be true and sufficient, and that the said answer of the said defendants, William F. Kettenbach, George H. Kester and William Dwyer is untrue, evasive and insufficient; wherefore, it prays relief as in its said bill set forth.

PEYTON GORDON,
Special Ass't to the Att'y General,
Solicitor for Complainant.

[Endorsed]: Filed February 7th, 1910. A. L. Richardson, Clerk. [74]

In the Circuit Court of the United States for the District of Idaho, Northern Division.

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER and WILLIAM DWYER,
Defendants.

Replication to Answer and Disclaimer.

Replication of complainant, in the above-entitled cause, to the answer and disclaimer of William Dwyer, defendant.

This replicant, saving and reserving all advantage of exception to the manifold insufficiencies of said answer and disclaimer of the said defendant, William Dwyer for replication thereto, saith: That it will ever aver, maintain and prove its said bill to be true and sufficient in law, and that said answer and disclaimer is untrue and insufficient; wherefore, replicant prays relief as in said bill of complaint set forth.

PEYTON GORDON,
Special Ass't. to the Att'y General,
Solicitor for Complainant.

[Endorsed]: Filed February 7th, 1910. A. L. Richardson, Clerk. [75]

*In the Circuit Court of the United States, Ninth
Judicial Circuit, District of Idaho, Northern
Division.*

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER and WILLIAM DWYER,
Defendants.

Notice of Motion [for Order to Amend Bill].

NOTICE OF MOTION.

To the Above-named Defendants and to Your Attorneys of Record, and to Each of You:

You are hereby notified that the undersigned solicitor for the complainant in the above-entitled cause will, on the 7th day of March, 1910, at Boise City, in the County of Ada, State of Idaho, at the courtrooms of the Circuit Court of the United States for the District of Idaho, in the Federal Building, at the hour of 10:00 o'clock A. M., or as soon thereafter as the counsel can be heard, move the Court for an order to amend the Original Bill of Complaint in the above-entitled cause, by interlineation, as set forth in the motion attached to this notice, and herewith served upon you.

On the hearing of said motion, counsel will use this notice of motion and all the files and records in the above-entitled cause, or so much thereof as may be

necessary for the purpose of said motion.

Dated this 24 day of Feb., 1910.

PEYTON GORDON,
Special Ass't Att'y Gen.,
Solicitor for Complainant. [26]

*In the Circuit Court of the United States, Ninth
Judicial Circuit, District of Idaho, Northern
Division.*

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER and WILLIAM DWYER,
Defendants.

Motion [for Order Permitting Amendment of Bill].

MOTION.

Comes now the United States of America, complainant in the above-entitled cause, by Peyton Gordon, Special Assistant to the Attorney General, its Solicitor, and by direction of George W. Wickersham, Attorney General, moves the Court for an order permitting an amendment to the Original Bill of Complaint, by interlineation, as follows, after the words, "The said complainant respectfully represents to this Court," eleven lines from the bottom of page 1 of the said Bill of Complaint, the following, to wit:

1-A. That at the time of filing this Bill of Complaint, defendants William F. Kettenbach and Will-

iam Dwyer were, and now are, citizens of the United States, residing at Lewiston, in the County of Nez Perce, State and District of Idaho.

That the defendant George H. Kester was, and now is, a citizen of the United States, and resident of Spirit Lake, State of Idaho.

Complainant further prays for an order allowing the amendment of the Original Bill of Complaint in the above-entitled [77] cause, by interlineation, as follows:

By inserting, on the last page of said Bill of Complaint, between the conclusion of the allegations and the signature of George W. Wickersham, the following words:

“May it please your Honors to grant unto the complainant a Writ of Subpoena, issued out of and under the seal of this Honorable Court, directed to the said defendants, William F. Kettenbach, George H. Kester and William Dwyer, commanding them by a day certain, and under a certain penalty therein to be inserted, to be and appear before this Honorable Court, and then and there to answer the premises; and further, to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience.

And your complainant will ever pray.”

PEYTON GORDON,

Special Assistant to the Attorney General,

Solicitor for Complainant.

[Endorsed]: Filed February 24th, 1910. A. L. Richardson, Clerk. [78]

State of Idaho,
County of Ada,—ss.

Peyton Gordon, being first duly sworn, on oath says:

That he is counsel and solicitor for the complainant, the United States, in that certain cause named in the foregoing Notice and Motion; that on the 24 day of February, 1910, he served the foregoing Notice and Motion on George W. Tannahill, counsel and solicitor for defendants named therein, by handing to and leaving with said George W. Tannahill, personally, a true copy of said Notice and Motion, at Boise, Ada County, Idaho.

That the foregoing service includes counsel and solicitors for all parties who have appeared in said cause.

PEYTON GORDON.

Subscribed and sworn to before me this 24th day of Feb., 1910.

A. L. RICHARDSON,
Clerk of the United States Circuit Court. [79]

In the Circuit Court of the United States, Ninth Judicial Circuit for the District of Idaho, Northern Division.

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
WILLIAM F. KETTENBACH et al.,
Defendants.

Affidavit [in Support of Motion to Amend Bill].**AFFIDAVIT.**

State of Idaho,

County of Ada,—ss.

Peyton Gordon, being first duly sworn, on oath deposes and says: That he is a Special Assistant to the Attorney General of the United States and is solicitor for the complainant in the above-entitled cause, and that he makes this affidavit for and on behalf of the complainant, The United States; that the said complainant being desirous of amending its bill of complaint in the said cause and having filed and served its notice and motion of such amendments according to the rules of this court, further says: That said motion and said proposed amendments are not made for the purpose of vexation or delay, and that the matter contained in said proposed amendments is material and could not with reasonable diligence have been sooner introduced into the said bill.

PEYTON GORDON.

Subscribed and sworn to before me this 8th day of March, A. D. 1910.

A. L. RICHARDSON,

Clerk U. S. Circuit Court. [80]

[Endorsed]: Filed March 8, 1910. A. L. Richardson, Clerk. [81]

*In the Circuit Court of the United States for the
Ninth Judicial Circuit, District of Idaho, North-
ern Division.*

EQUITY—No. 407.

THE UNITED STATES OF AMERICA,

vs.

WM. F. KETTENBACH et al.

**Order [Granting Plaintiff Leave to File Amendment
to Complaint].**

ORDER.

On this day this cause came on to be heard upon the plaintiffs' motion for leave to amend the complaint herein, and it appearing to the Court that due notice was given and served upon counsel for defendants and no appearance having been made or objection filed on that behalf, upon motion of Peyton Gordon, Assistant to the Attorney General, it is ordered that said plaintiff be and is hereby given leave to file amendments to said complaint.

Dated March 8, 1910. [82]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER, WILLIAM DWYER,
Defendants.

Amendment to Bill in Equity.

To the Honorable Judges of the Circuit Court of the United States for the District of Idaho:

Now comes the United States of America, the complainant in the above-entitled cause, by George W. Wickersham, the Attorney General of the United State of America, by leave of the Court in that behalf first had and obtained, and makes and files this, the said complainant's Amendments to its Bill of Complaint, in the said cause as follows:

1st. After the words, "The said complainant respectfully represents to this Court," eleven lines from the bottom of page 1 of the said Bill of Complaint, insert the following:

1-A. That at the time of filing this Bill of Complaint, defendants William F. Kettenbach and William Dwyer were, and now are, citizens of the United States, residing at Lewiston, in the county of Nez Perce, State and District of Idaho;

That the defendant George H. Kester was, and now is, a citizen of the United States, and resident of Spirit Lake, State of Idaho. [83]

2d. By inserting on the last page of said Bill of Complaint, between the conclusion of the allegations and the signature of George W. Wickersham, the following words:

"May it please your honors to grant unto the complainant a Writ of Subpoena, issued out of and under the seal of this Honorable Court, directed to the said defendants, William F. Kettenbach, George H. Kester and William Dwyer, commanding them by a day certain, and under a certain penalty therein to

be inserted, to be and appear before this Honorable Court, and then and there to answer the premises; and further, to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience.

And your complainant will ever pray."

GEORGE W. WICKERSHAM,

Attorney General of the United States,

PEYTON GORDON,

Special Assistant to the Attorney General,

Solicitors for Complainant.

[Endorsed]: Filed March 8th, 1910. A. L. Richardson, Clerk. [84]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

No. 407.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

WM. F. KETTENBACH, GEORGE H. KESTER,
WILLIAM DWYER,

Defendants.

Praeipie for Subpoena Ad Respondendum.

PRAECIPE.

A. L. Richardson, Clerk of the Circuit Court of the
United States.

Sir: You will please issue subpoenas ad respondendum in the above-entitled cause, together with certified copies of amendments to bill of complaint filed herein, by leave of the Court, upon Wm. F. Ketten-

4664 *The United States of America*

bach, George H. Kester, William Dwyer.

PEYTON GORDON,

Special Assistant to the Attorney General,

Solicitor for Complainant.

[Endorsed]: Filed March 8, 1910. A. L. Richardson, Clerk. [85]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

No. 407.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER, and WILLIAM DWYER,
Defendants.

**Application [for Permission] to File Fourth
Defense and Plea in Bar.**

**APPLICATION TO FILE FOURTH DEFENSE
AND PLEA IN BAR.**

Comes now the defendants herein and apply to the above-entitled Court for permission to file their fourth defense and plea in bar herewith presented for filing upon the ground and for the following reasons:

1.

That the said fourth defense and plea in bar is material, relevant, and competent, and is a proper defense to be interposed to the complainant's Bill in Equity on file herein.

2.

That the issues raised by the said fourth defense and plea in bar cannot be tried or determined unless the same are affirmatively pleaded.

This application is made and based upon the complainant's bill in equity on file herein and fourth defense and plea in bar herewith presented for filing and all the files and records in the above-entitled cause.

GEO. W. TANNAHILL,

Solicitor for Defendants, Residing at Lewiston,
Idaho.

State of Idaho,

County of Nez Perce,—ss.

Geo. W. Tannahill, being duly sworn, upon oath says that he is the solicitor for the defendants above named, that the foregoing application is made in good faith and not for purpose of delay, and is as affiant verily believes well founded in point of law.

GEO. W. TANNAHILL. [86]

Subscribed and sworn to before me this 5th day of May, A.D. 1910.

[N. P. Seal]

GEO. E. ERB,

Notary Public in and for Nez Perce County, State of Idaho.

[Endorsed]: Filed May 9, 1910. A. L. Richardson, Clerk. [87]

*In the Circuit Court of the United States in and for
the District of Idaho, Northern Division.*

IN EQUITY—No. 407.

UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.

KESTER and WILLIAM DWYER,

Defendants.

**Order [Allowing Filing of Fourth Defense and Plea
in Bar, and Overruling Plea].**

ORDER.

Now came the defendants herein and by leave of the Court are allowed to file their fourth defense and plea in bar. Thereupon, by agreement of the solicitors for complainant and defendants, said plea was set down for argument forthwith upon its sufficiency in law to constitute a bar to the part of the bill to which it is addressed, and upon hearing upon the sufficiency of said plea it appearing to the Court that the plea is insufficient in law, it is ordered that the same be, and hereby is, overruled.

Dated May 11, 1910. [88]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER, WILLIAM DWYER,
Defendants.

Fourth Defense and Plea in Bar.

To the Honorable the Judges of the Circuit Court
of the United States, for the District of Idaho:

Come now the defendants William F. Kettenbach,
George H. Kester and William Dwyer, by leave of
Court first had and obtained, and file this their fur-
ther, separate and fourth defense and plea in bar to
complainant's bill in equity on file herein, and re-
spectfully represent to this Court as follows:

1.

That each and all of the conveyances made by the
various entrymen to the defendants herein have been
conveyed by warranty deeds or by instruments in
writing, by which their title to the said tracts of land
was warranted, and the defendants conveying the
same to the various transferees are liable on their
warranties in case the title fails, and by reason
thereof, in addition to their equity of redemption in
the lands held by Idaho Trust Company, the defend-
ants herein have an interest in all of the land in con-
troversy which has been conveyed by them by reason

of their warranty contained in the deeds, and conveyances made, executed [89] and placed of record, and delivered to the various purchasers.

2.

That heretofore, on the 13th day of July, A. D. 1905, in the United States District Court within and for the Central Division, District of Idaho, in the case of *The United States of America vs. Jackson O'Keefe, William Dwyer, George H. Kester and William F. Kettenbach*, a Grand Jury, then in session, returned an indictment against these defendants, William F. Kettenbach, George H. Kester and William Dwyer, charging conspiracy to defraud the United States in violation of Section 5440, R. S. U. S., in which indictment, and in Count One thereof, the charges against these defendants are in substance, as follows:

“That heretofore, to wit, on the 25th day of April, 1904, at the place aforesaid, Jackson O'Keefe, William Dwyer, George H. Kester and William F. Kettenbach, and other persons to the Grand Jurors unknown, did falsely, unlawfully and wickedly conspire, combine, confederate and agree together among themselves to defraud the United States of the title and possession of large tracts of land situated in the County of Shoshone, and State and District of Idaho, and of great value, of which the following described land is a part, viz.: All that tract or parcel of land described as follows, to wit: Lots One and Two and the East Half of the Northwest Quarter of Section Thirty, Township Thirty-eight,

North of Range Six, East of Boise Meridian, in the County of Shoshone, and State and District of Idaho, by means of false, fraudulent, untrue and illegal entries of said lands under the laws of the United States, the said lands being then and there public lands of the United States open to entry and sale under said laws of the United States at the local land office of the United States at said City of Lewiston in said State and District of Idaho. That according to and in pursuance of said conspiracy, combination, confederation and agreement among themselves had as aforesaid, and to effect the object of said conspiracy, the said Jackson O'Keefe, William Dwyer, George H. Kester and William F. Kettenbach did on said 25th day of April, 1904, at the City of Lewiston in the County of Nez Perce, in the State and District of Idaho, and within the jurisdiction of this court, [90] fraudulently, unlawfully and corruptly persuade and induce one Charles W. Taylor of said District then and there being, to take his corporal oath and be then and there sworn before one J. B. West, who was then and there the duly appointed, qualified and acting Register of the United States Land Office at said City of Lewiston, in said Lewiston Land District, and who was then and there an officer and person having due and competent authority to administer said oath and who did then and there administer said oath to the said Charles W. Taylor. That a certain written affidavit and statement by him, the said Charles W. Taylor,

then and there made, sworn to and subscribed, was true, which said written affidavit and statement then and there subscribed and sworn to by him, the said Charles W. Taylor, at the request and by the procurement of them, the said Jackson O'Keefe, William Dwyer, George H. Kester and William F. Kettenbach, as aforesaid, was then and there in a case in which a law of the United States authorized an oath to be administered and that said written affidavit and statement was then and there required of him, the said Charles W. Taylor, by law, and the rules and regulations of the Interior Department and the General Land Office of the United States, which said written affidavit and statement was then and there that certain written application to the Register of the United States Land Office, at said City of Lewiston, duly made and filed by him, the said Charles W. Taylor, in the United States Land Office at said City of Lewiston, on the 25th day of April, 1904, whereby he, the said Charles W. Taylor, duly applied to the said Register of the said United States Land Office at said City of Lewiston, to enter and purchase under that certain Act of Congress approved June 3, 1878, entitled, 'An Act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory,' amended by that certain Act of Congress approved August 4, 1893, entitled: 'An Act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws,' the land

hereinbefore described, to wit: Lots One and Two and the East Half of the Northwest Quarter of Section Thirty, Township Thirty-eight North of Range Six, East of Boise Meridian, situate within the District of lands subject to entry and sale under the public land laws of the United States, at the said United States Land Office at Lewiston, Idaho, and which written affidavit and statement sworn to as aforesaid, he, the said Charles W. Taylor, and the said Jackson O'Keefe, William Dwyer, George H. Kester and William F. Kettenbach, and each of them, did then and there know to be false, fraudulent and untrue. * * *

Which indictment was and is numbered 605, and which indictment was then and there on the said 13th day of July, 1905, [91] duly and regularly filed in the above-entitled court and now remains of record therein, and which indictment contains Count One, involving the entry of Charles W. Taylor and the land hereinbefore described, and Count Two thereof contains the same allegations as appear in Count One and hereinbefore pleaded, involving the entry of Edgar H. Dammarell, embracing the northwest quarter of section 19, township 38, north of range 6 E., B. M. Count Three thereof contains the same allegations as appear in Count One and involves the entry of Edgar J. Taylor, embracing lots 3 and 4, and the east half of the southwest quarter of section 18, township 38, north of range 6 E., B. M. The Fourth Count thereof involves the entry of Joseph H. Prentice, and embraces lots 2 and 3 and the east

half of the northwest quarter of section 18, township 38, north of range 6 E., B. M., and which count contains the same allegations as are contained in Count One hereof.

3.

INDICTMENT NO. 607.

That heretofore, on the 13th day of July, A. D. 1905, in the District Court of the United States, within and for the Central Division of the District of Idaho, a Grand Jury duly sworn and empaneled, returned an indictment against the defendants, William Dwyer, George H. Kester and William F. Kettenbach, charging the said defendants with conspiracy to defraud the United States in violation of section 5440, R. S. U. S. consisting of Counts One, Two and Three, which said indictment is No. 607, returned by the Grand Jury and filed by the Clerk of the above-entitled court on the said 13th day of July, [92] 1905, and now appears on file therein, and which indictment is here referred to and made a part hereof as fully as if here set out.

That in Count One of said indictment there appears substantially the same allegations as to conspiracy, fraud, perjury and subornation of perjury as appears in the first count of Indictment No. 605, hereinbefore pleaded, set out and referred to, with the exception that the name of the entryman is Rowland A. Lambdin, and the land involved is described as southwest quarter of section 29, township 42 north of range 1, west of Boise meridian, with other land.

That in Count Two of said Indictment No. 607, there appears substantially the same allegation as in

Count One of Indictment No. 605, except that the name of the entryman is Fred W. Shaeffer, and the land is described as the east half of the northwest quarter and the southwest quarter of the northeast quarter and the northwest quarter of the southeast quarter of section twenty-seven, township 40 north of range 1, west of the Boise meridian, with other land.

That in Count Three of said Indictment No. 607 there appears substantially the same allegation as in Count One of Indictment No. 605, except that the name of the entryman is given as Ivan R. Cornell, and the land involved is described as lots 6 and 7 and the east half of the southwest quarter of section twenty-seven, township 40, north of range 1 west of Boise meridian, with other lands.

4.

INDICTMENT NO. 615.

That in the District Court of the United States, within and for the Northern Division, District of Idaho, on the 6th day of November, 1905, a Grand Jury, duly sworn and [93] empaneled, returned an indictment against the defendants, William F. Kettenbach, George H. Kester and William Dwyer, charging these defendants with conspiracy to defraud the United States in violation of Section 5440, R. S. U. S., which indictment is numbered 615, returned by the Grand Jury and filed by the Clerk of the above-entitled court November 6, 1905, and now remains on file therein, which said indictment is here referred to and made a part hereof as fully as if here set out.

That said indictment contains five counts, the first thereof involving the entry of Edward M. Lewis, and in which count substantially the same allegations are made as in Count One of Indictment No. 605, with the exception that the name of the entryman is different and the land involved is described as the north half of the northeast quarter and the southwest quarter of the northeast quarter of section 19, township 39 north of range 5 east of Boise meridian, with other land.

That in Count Two of said Indictment appears substantially the same allegation as appears in Count One of Indictment No. 605, hereinbefore pleaded, except that the name of the entryman is given as Hiram F. Lewis, and the land involved is described as the northwest quarter of section 20, township 38, north of range 5 east of Boise meridian, with other land.

That in Count Three thereof substantially the same allegations are made as appear in Count One of Indictment No. 605, except that the name of the entryman is given as Charles Carey, and the land involved with other land, is described as north half of northeast quarter, and the north half of the northwest quarter of section 15, township 38 north of range 6 east of Boise meridian. [94]

That in Count Four thereof substantially the same allegations appear as in Count One of Indictment No. 605, except that the name of the entryman is given as Guy L. Wilson, and the land, with other lands, is described as lots 3 and 4, and the northeast quarter of the southwest quarter, and the northwest

quarter of the southeast quarter of section 19, township 39 north of range Five east of Boise meridian.

That in Count Five of said indictment appear substantially the same allegations as in Count One of Indictment No. 605, with the exception that the name of the entryman is given as Frances A. Justice, and the land, with other land, is described as lots 3 and 4, and the east half of the southwest quarter of section 19, township 38 north of range 6 east of Boise meridian.

5.

INDICTMENT NO. 617.

That heretofore, in the United States District Court for the Northern Division, District of Idaho, on the 6th day of November, 1905, a Grand Jury, duly and regularly empaneled and sworn, returned an indictment against the defendant William F. Kettenbach, with William B. Benton and Clarence W. Robnett, charging the defendants with the crime of conspiracy to defraud the United States in violation of section 5440, R. S. U. S., which indictment is numbered 617, returned by the Grand Jury and filed by the Clerk of the above-entitled court on November 6th, 1905, and now appears of record therein, which indictment is here referred to and made a part hereof as fully as if here set out.

That in said indictment appear Counts One, Two and Three, and in each of said counts there appears substantially [95] the same allegation as appears in Count One of Indictment No. 605, except that the name of the entryman in Count One of said Indictment is given as John H. Long, and the land is de-

scribed as lot 2, southwest quarter of the northeast quarter, and the south half of the northwest quarter of section 24, township 39 north of range 3 east of Boise meridian, and in Count Two, the name of the entryman is given as Francis M. Long and the land is described as the north half of the southwest quarter and north half of the southeast quarter of section 13, township 29 north of range 3 east of Boise meridian; and in Count Three the name of the entryman is given as Benjamin F. Long and the land is described as the south half of the northwest quarter and the south half of the northeast quarter of section 13, township 39 north of range 3 E., B. M., together with other lands.

6.

INDICTMENT NO. 618.

That in the District Court of the United States within and for the District of Idaho, Northern Division, on the 6th day of November, 1905, a Grand Jury, duly and regularly empaneled and sworn, returned an indictment against two of the defendants herein, to wit: George H. Kester and William F. Kettenbach, together with Fred Emery and C. W. Colby, charging the said defendants with conspiracy to defraud the United States in violation of section 5440, R. S. U. S., which said indictment is No. 618, returned by the Grand Jury, and filed by the Clerk of the above-entitled court on November 6th, 1905, and now appears on file therein, which indictment is here referred to and made a part hereof, as fully as if here set [96] out.

That said indictment contains Counts One and

Two, and in each of said counts appear substantially the same allegations as appear in Count One of Indictment No. 605, except that the name of the entryman in Count One thereof is given as James C. Evans, and the land is described as the south half of the northwest quarter and the west half of the southwest quarter of section 25, township 39 north of range 3 east of Boise meridian, with other lands, and in Count Two thereof the name of the entryman is designated as Charles Dent and the land is described as the north half of the northeast quarter, and the north half of the northwest quarter of section 14, in township 39 north of range 3 east of Boise meridian, with other lands.

7.

INDICTMENT NO. 635.

That in the United States District Court for the Central Division, District of Idaho, on the 22d day of March, 1907, a Grand Jury duly and regularly empaneled and sworn, returned an indictment against the defendants herein, together with Isham N. Smith, John B. West and Clarence W. Robnett, charging the defendants with conspiracy to defraud the United States in violation of section 5440, R. S. U. S., which said indictment was returned by the Grand Jury and filed by the Clerk of the above-entitled court March 22d, 1907, and which indictment is numbered 635, now appears of record in the above-entitled court, and is made a part hereof as fully as if here set out.

That in said indictment appear substantially the same allegations as appear in Indictment No. 605,

with the exception of the name of the entrymen and the [97] description of the land. The name of the entryman given in Count One thereof is Edward M. Lewis, and the land is described as the north half of the northeast quarter and the southwest quarter of the northeast quarter of section 29, township 39 north of range 5 east of Boise meridian, and in Count Two thereof the name of the entryman is given as Hiram F. Lewis and the land is described as the northwest quarter of section 20, township 38 north of range 5 east of Boise meridian. In Count Three thereof the name of the entryman is given as Charles Carey, and the land is described as the north half of the northeast quarter and the north half of the northwest quarter of section 15, township 38 north of range 6 east of Boise meridian, and in Count Four thereof, the name of the entryman is designated as Guy L. Wilson, and the land is described as lots 3 and 4 and the northeast quarter of the southwest quarter and the northwest quarter of the southeast quarter of section 19, township 39 north of range 5 east of Boise meridian; and in Count Five thereof the name of the entryman is given as Frances A. Justice and the land is described as lots 3 and 4, and the east half of the southwest quarter of section 19, township 38 north of range six east of Boise meridian, with other lands.

8.

INDICTMENT NO. 637.

That heretofore in the United States District Court within and for the Central Division, District of Idaho, a Grand Jury in the above-entitled court,

duly and regularly empaneled and sworn, returned an indictment against the defendants, George H. Kester, William F. Kettenbach and William Dwyer, together with Isham N. [98] Smith, John B. West, Clarence W. Robnett, John Doe and Richard Roe, whose true names are to the Grand Jurors unknown, and divers other persons whose true names are to the Grand Jurors unknown, which said indictment was returned by the Grand Jury and filed by the Clerk of said Court on April 12, 1907, now appears of record therein, and is made a part hereof as fully as if here set out, which said indictment is in one count, and involves the entries of Edward M. Lewis, Hiram F. Lewis, Charles Carey, Guy L. Wilson, Frances A. Justice, Charles W. Taylor, Edgar J. Taylor and divers other persons whose names are alleged to be to the Grand Jurors unknown, and in which appears substantially the same allegation as appears in Count One of Indictment No. 605, and which said indictment herein referred to is No. 637, and embraces the land hereinbefore in said indictments described.

9.

That to each and all of the indictments herein referred to, the defendants entered their pleas of "Not Guilty," issues of fact were joined thereon, and thereafter in the United States District Court for the Northern Division, District of Idaho, at Moscow, in the County of Latah, in said District, on the 17th day of May, A. D. 1907, the defendants herein, William F. Kettenbach, George H. Kester and William Dwyer were tried on said indictment No. 615, re-

turned and filed November 6, 1905, charging the defendants with the crime of conspiracy to defraud the United States in violation of Section 5440, R. S. U. S., in which indictment the same issues were involved as are involved in the above-entitled cause, and in which trial there was used the evidence of [99] Rowland A. Lambdin, Fred W. Shaeffer, Ivan R. Cornell and many of the other entrymen whose claims are involved in the above-entitled cause, and in which an effort is made to have the patents set aside.

10.

That after a trial before the jury in said court and in said cause, the jury returned a verdict of "Not Guilty" upon Counts One, Two and Five of indictment No. 615, which verdict is hereto attached, marked Exhibit "A," and made a part hereof as fully as if here set out, and which was filed June 17, 1907, and now appears of record and on file in the above-entitled court.

11.

That thereafter, on the 31st day of January, 1910, the plaintiff, The United States of America, by and through its proper officers, in the causes of The United States of America, plaintiff, v. William F. Kettenbach, George H. Kester and William Dwyer, Indictment No. 615; and The United States of America v. William Dwyer, George H. Kester and William F. Kettenbach, Indictment No. 607; and The United States of America v. William Dwyer, George H. Kester, William F. Kettenbach and Jackson O'Keefe, No. 605, moved for a consolidation of said

indictments, which motion is now on file in said District Court, within and for the Central Division, District of Idaho, copy of which is attached hereto, marked Exhibit "B," and made a part hereof as fully as if here set out; and thereafter, on the 15th day of February, 1910, the said court made an order consolidated said Indictments No. 615, No. 607 and No. 605; and thereafter the defendants moved to consolidate with Indictments No. 615, No. 607 and No. 605, indictments numbered 617, 618, 635 and [100] 637, herein referred to, in so far as they related to the defendants William F. Kettenbach, George H. Kester and William Dwyer, and that a severance be granted as to the remaining defendants in the several indictments; after which the United States dismissed Indictments Numbered 617 and 618 as to defendants Kettenbach and Kester, and the Court made its order consolidating Indictments No. 635 and No. 637 with Indictments No. 615, No. 607 and No. 605.

12.

That after the Government had closed its case in the said trial before a jury, the defendants moved the Court to require the Government to elect upon which indictments it would rely for a conviction, and the Government elected to rely upon Indictments numbered 615, 607 and 605, as consolidated, and thereafter the defendants introduced their evidence in their defense before said jury, in said court, and after argument of respective counsel and instructions of the Court, the jury retired to consider their verdict of "Not Guilty" as charged in the several indict-

ments in the above-entitled causes, exclusive of Counts One, Two and Five in case No. 615, which Counts One, Two and Five were not submitted to the jury for their consideration for the reason that a verdict had theretofore been returned in favor of the defendants finding them not guilty upon said counts, which verdict was duly and regularly filed by the Clerk of said Court on February 26, 1910, now on file herein, and a true copy of which is attached hereto, marked Exhibit "C" and made a part hereof as fully as if here set out. [101]

13.

That in said several indictments the same issues are involved as are involved in the above-entitled cause, to wit: The charge of conspiracy to defraud the United States in violation of section 5440, R. S. U. S., and to acquire large tracts of public lands in violation of the Timber and Stone Laws of the United States, by perjury, subornation of perjury and by procuring entrymen to file upon the land in violation of law, and it will be necessary to use the same evidence in support of the issues in the above-entitled cause as was used in the several criminal actions in support of the indictments on file herein; and to try the defendants upon the complainant's bill in equity in the above-entitled cause is, in effect, to try the defendants twice for the same offense, which is prohibited by the Constitution of the United States.

14.

That the Government has heretofore elected to prosecute the defendants criminally for the same and

identical charges pleaded and alleged in the above-entitled cause, and having elected to rely upon a criminal prosecution for the punishment of the defendants, the complainant should not be heard or permitted to prosecute a civil action at this time for the purpose of depriving the defendants of their property, and for the purpose of trying and punishing the defendants twice for the same offense.

15.

That the said United States District Court within and for the District of Idaho, both for the Northern and Central Divisions, had and acquired jurisdiction of each of the defendants in each of said indictments and had and possessed jurisdiction of each of the subject [102] matters involved therein, and had and possessed jurisdiction to hear and determine each and all of the matters in issue therein.

WHEREFORE, these defendants pray that their plea of former acquittal be held to be a bar to the prosecution in this action, that this action be dismissed, and that they be permitted to go without day.

WILLIAM F. KETTENBACH.

GEORGE H. KESTER.

WILLIAM DWYER.

GEO. W. TANNAHILL,

Solicitor for Defendants, Residing at Lewiston, Idaho.

[Endorsed]: Filed May 11, 1910. A. L. Richardson, Clerk. [103]

Exhibit "A" [Verdict in Case No. 615].

*United States District Court, Northern Division,
District of Idaho.*

No. 615.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER and WILLIAM DWYER,

Defendants.

We, the jury in the above-entitled cause, find the defendant William F. Kettenbach Not Guilty as charged in the first count of the indictment, and we find the defendant William F. Kettenbach Not Guilty as charged in the second count of the indictment, and we find the defendant William F. Kettenbach Guilty as charged in the third count of the indictment, and we find the defendant William F. Kettenbach Guilty as charged in the fourth count in the indictment, and we find the defendant William F. Kettenbach Not Guilty as charged in the fifth count of the indictment, and we find the defendant George H. Kester Not Guilty as charged in the first count of the indictment, and we find the defendant George H. Kester Not Guilty as charged in the second count of the indictment, and we find the defendant George H. Kester Guilty as charged in the third count of the indictment, and we find the defendant George H. Kester Guilty as charged in the fourth count of the indictment, and we find the defendant George H.

Kester Not Guilty as charged in the fifth count of the indictment, and we find the defendant William Dwyer Not Guilty as charged in the first count of the indictment, and we find the defendant William Dwyer Not Guilty as charged in the second count of the indictment, and we find the defendant William Dwyer Guilty as charged in the third count of the indictment, and we find the defendant William Dwyer Guilty as charged in the fourth count of the indictment, and we find the defendant William Dwyer Not Guilty as charged in the fifth count of the indictment.

M. D. FREEDENBERG,
Foreman of the Jury.

[Endorsed]: No. 615. In the District Court of the United States for the District of Idaho. United States of America vs. William F. Kettenbach, George H. Kester and William Dwyer. Verdict. Filed June 16, 1907. A. L. Richardson, Clerk.
[104]

Exhibit "B" [Motion to Consolidate Causes Nos. 605, 607, and 615].

UNITED STATES OF AMERICA.

*In the District Court of the United States for the
District of Idaho, Central Division.*

No. 615.

UNITED STATES OF AMERICA,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER and WILLIAM DWYER.

No. 607.

UNITED STATES OF AMERICA

vs.

WILLIAM DWYER, GEORGE H. KESTER and
WILLIAM F. KETTENBACH.

No. 605.

UNITED STATES OF AMERICA

vs.

WILLIAM DWYER, GEORGE H. KESTER and
WILLIAM F. KETTENBACH (Impleaded
With JACKSON O'KEEFE).

NOW COMES the United States of America, by Peyton Gordon, Esq., Special Assistant to the Attorney General of the United States, and attorney for the plaintiff in this behalf, and MOVES the Court to consolidate the above-entitled causes for trial against George H. Kester and William F. Kettenbach and William Dwyer, defendants therein named, said motion being based upon the files and records in said causes.

Boise, Idaho, January 31, 1910.

PEYTON GORDON,

Special Assistant to the Attorney General of the
United States and Attorney for said Plaintiff.

Received copy Feby. 1, 1910.

GEO. W. TANNAHILL,

Atty. for Defts. [105]

Exhibit "C" [Verdict in Cases Nos. 605, 607 and 615].

In the District Court of the United States, District of Idaho, Northern Division.

No. 615.

THE UNITED STATES

vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER and WILLIAM DWYER.

No. 605.

THE UNITED STATES

vs.

JACKSON O'KEEFE, WILLIAM DWYER, GEORGE H. KESTER and WILLIAM F. KETTENBACH.

No. 607.

THE UNITED STATES

vs.

WILLIAM DWYER, GEORGE H. KESTER and WILLIAM F. KETTENBACH.

We, the jury in the above-entitled consolidated causes, find the defendants, William F. Kettenbach, George H. Kester and William Dwyer, not guilty as charged in the several Indictments, in the above-entitled causes, exclusive of counts, one, two, and five in cause numbered 615.

WM. B. ALLISON,
Foreman.

[Endorsed]: No. 615—Consolidated. U. S. District Court, Northern Division, District of Idaho. The United States vs. William F. Kettenbach et al. Verdict. Filed Feb. 26, 1910. A. L. Richardson, Clerk. [106]

[Marshal's Return of Service of Alias Subpoena Ad Respondendum, etc.]

I hereby certify that I received the within alias subpoena ad respondendum, together with three duplicates of alias subpoena ad respondendum and three certified copies of amendments to bill of complaint at Moscow, Latah County, Idaho, on the 18th day of March, 1910, and served the same upon William F. Kettenbach by handing to and leaving with the said William F. Kettenbach, a duplicate of the within alias subpoena ad respondendum, together with a certified copy of the amendments to bill of complaint, personally, at Lewiston, Nez Perce County, Idaho, on the 22d day of March, 1910, said William F. Kettenbach accepting service in writing of the original bill of complaint as of the 22d day of March, 1910, at Lewiston, Idaho.

Served the same upon Geo. H. Kester and William Dwyer by handing to and leaving with Geo. W. Tannahill, attorney for the said Geo. H. Kester and William Dwyer, a duplicate of the within alias subpoena ad respondendum, together with a certified copy of the amendments to bill of complaint, personally, at Lewiston, Nez Perce County, Idaho, on the 22d day of March, 1910, the said Geo. W. Tannahill accepting service in writing of the original bill of

complaint as of the 22d day of March, 1910, at Lewiston, Nez Perce County, Idaho.

S. L. HODGIN,
U. S. Marshal.
By J. E. Greene,
Deputy.

Moscow, Idaho, April 4th, 1910. [107]

*In the Circuit Court of the United States for the
Northern Division of the District of Idaho.*

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER and WILLIAM DWYER,
Defendants.

Subpoena Ad Respondendum.

The President of the United States of America, to
William F. Kettenbach, George H. Kester and
William Dwyer, Greeting:

You and each of you are hereby commanded that
you be and appear in said Circuit Court of the
United States, at the courtroom thereof, in Moscow,
in said District, on the first Monday of April next,
which will be the 4th day of April, A. D. 1910, to
answer the exigency of a Bill of Complaint exhibited
and filed against you in our said Court, wherein The
United States of America is complainant and you are
defendants, and further to do and receive what our
said Circuit Court shall consider in this behalf, and

this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to COMMAND you, the MARSHAL of said District, or your DEPUTY, to make due service of this our WRIT of SUBPOENA and to have then and there the same.

Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the Seal of our said Circuit Court affixed at Boise in said District, this 9th day of March in the year of our Lord One Thousand Nine Hundred and Ten and of the [108] Independence of the United States the One Hundred and thirty-fourth.

A. L. RICHARDSON,
Clerk.

[Endorsed]: Filed June 14, 1910. A. L. Richardson, Clerk. [109]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER and WILLIAM DWYER,
Defendants.

**Stipulation [That Answer and Disclaimer to Bill
Shall Stand as Answer and Disclaimer to Bill as
Amended].**

STIPULATION.

IT IS HEREBY stipulated and agreed by and between the parties to this cause that the answer and disclaimer heretofore filed by and on behalf of defendants to the complainant's Bill of Complaint in said cause shall stand as their answer and disclaimer to the complainant's Bill of Complaint as Amended, and,

IT IS HEREBY further stipulated and agreed by and between said parties that the replications heretofore filed by and on behalf of complainant in the above-entitled cause to the answer and disclaimer of the several defendants in said cause to complainant's Bill of Complaint shall stand as the replications to the said answer and disclaimer of said defendants to said Bill of Complaint as Amended.

PEYTON GORDON,

Special Assistant to the Attorney General, Solicitor
for Complainant.

GEO. W. TANNAHILL,

Solicitor for Defendants, William F. Kettenbach,
George H. Kester and William Dwyer.

[Endorsed]: Filed June 25, 1910. A. L. Richardson, Clerk. [110]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Complainant,
vs.

WILLIAM F. KETTENBACH and Others,
Defendants.

Order [Appointing Warren Truitt of Moscow,
Idaho, Special Examiner to Take Testimony,
etc.].

ORDER.

The parties to this cause having requested the Court to appoint an Examiner,

It is hereby ordered that Warren Truitt, Esq., of Moscow, Idaho, be, and he hereby is appointed a Special Examiner herein, to take the testimony in this cause, and to report the same to the Court with all convenient speed. His compensation for such services will be at the rate of \$10.00 per diem.

Dated July 15th, 1910.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 15th, 1910. A. L. Richardson, Clerk. [111]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

IN EQUITY—Nos. 388, 406 and 407.

UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH et al.,

Defendants.

**Order [Appointing A. M. Wing Special Examiner to
Take Testimony in Portland, Oregon.]**

ORDER.

Upon the application of complainant in the above-entitled causes, it is this 15th day of July, 1910, ordered, that A. M. Wing of Portland, Oregon, be, and he is hereby appointed and constituted a Special Examiner of this Court for the purpose of taking testimony in the said causes and he is authorized and empowered as such Special Examiner to take the testimony herein of such witnesses as may be offered by either party at Portland, Oregon.

FRANK S. DIETRICH,

District Judge. [112]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

IN EQUITY—Nos. 388, 406 and 407.

UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH et al.,

Defendants.

**Order [Appointing Leo Longley Special Examiner
to Take Testimony in Los Angeles, Cal.].****ORDER.**

Upon the application of the complainant in the above-entitled causes, it is this 15th day of July, 1910, ordered, that Leo Longley of Los Angeles, California, be, and he is hereby appointed and constituted a Special Examiner of this Court for the purpose of taking testimony in the said causes and he is authorized and empowered as such Special Examiner to take the testimony herein of such witnesses as may be offered by either party at Los Angeles, California.

FRANK S. DIETRICH,
District Judge. [113]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

IN EQUITY—Nos. 388, 406 and 407.

UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH et al.,

Defendants.

**Order [Appointing Warren Truitt Special Examiner
to Take Testimony at Spokane, Wash.].****ORDER.**

Upon the application of Complainant in the above-entitled causes, it is ordered that Warren Truitt of Moscow, Idaho, be, and he is hereby appointed and constituted a Special Examiner of this Court, for the

purpose of taking testimony in the said causes, and he is authorized and empowered as such Special Examiner to take the testimony therein of such witnesses as may be offered by either party at Spokane, Washington.

Dated August 20, 1910.

FRANK S. DIETRICH,
Judge. [114]

**[Order Extending Time to October 15, 1910, for
Taking of Testimony.]**

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH and Others,
Defendants.

Upon application of the complainant, by Peyton Gordon, Special Assistant to the Attorney General, its solicitor, and a number of the defendants through their solicitors, George W. Tannahill and C. C. Cavanaugh,

It is ordered, that the time for the taking of the testimony in the above-entitled cause be, and the same hereby is, extended to and including the 15th day of October, 1910. The complainant to begin the

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taking of its testimony on the 22d day of August, 1910.

Dated July 15, 1910.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 15th, 1910. A. L. Richardson, Clerk. [115]

[**Prae**cipe for Subpoena Returnable at **Moscow**.]

*In the Circuit Court, United States, District of
Idaho.*

IN EQUITY—388.

THE UNITED STATES

vs.

W. F. KETTENBACH et al.

The Clerk of said Court will issue Subpoena for the following named persons to appear before the Examiner of said Court, at Moscow, at 9 o'clock A. M., on the 22d day of August, 1910, then and there to testify in behalf of the United States:

John Doe.

This 18th day of July, 1910.

PEYTON GORDON,
Special Asst. to the Attorney General.

[Endorsed]: Filed this 18th day of July, 1910.
A. L. Richardson, Clerk. [116]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA

vs.

WILLIAM F. KETTENBACH et al.

**Praecipe for Subpoena [Returnable at Lewiston,
Idaho].**

To the Clerk of said Court:

Sir: Issue subpoena, returnable before Hon. Warren Truitt, Special Examiner for said Court, at room 301 Weisgerber Bldg., Lewiston, Idaho, at 9 o'clock in the morning of August 24, 1910, for the following named witnesses, to testify for the complainant:

Frank J. Bonney, Oro Fino, Ida.

Respectfully,

PEYTON GORDON,

Special Assistant to the Attorney General of the
United States.

[Endorsed]: Filed Aug. 11th, 1910. A. L. Richardson, Clerk. [117]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

IN EQUITY—Nos. 388, 406 and 407.

UNITED STATES OF AMERICA,

Complainant,

vs.

WM. F. KETTENBACH et al.,

Defendants.

**Stipulation [Concerning Hearing of Motion to
Reopen Causes].**

STIPULATION.

IT IS HEREBY AGREED by and between counsel for the respective parties in the above-entitled causes that the hearing upon a motion and notice thereon heretofore served and filed in these causes for the purpose of reopening the said causes and the taking of additional and newly discovered testimony therein, may be heard at a future date by agreement of counsel, and that upon such agreement by counsel as to a date definite and specific on further notice of said hearing, said notice is waived.

IT IS FURTHER AGREED by and between the respective parties thereto that the hearing of this motion, and if the same is granted and such additional testimony taken therein, shall in no manner interfere with the speeding of the causes or the preparation of the briefs on the testimony already taken.

It is further stipulated and agreed by and between the parties to said causes that the deposit slip set out in the affidavit served herewith both in the front and the back of the same is in the handwriting of the defendant Wm. F. Kettenbach, and that the same is a part of the files of the Lewiston National Bank, and that [118] said deposit slip is now on file with the Clerk of this Court in the case of U. S. vs. Kester

and Kettenbach, marked Pltfs. Exhibit No. 39.

PEYTON GORDON,
Solicitor for Complainant.
GEO. W. TANNAHILL
Solicitor for Defendants.
J. E. BABB,
Solicitor for Certain Defendants.

[Endorsed]: Filed April 20, 1911. A. L. Richardson, Clerk. [119]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

IN EQUITY—Nos. 388, 406 and 407.

UNITED STATES OF AMERICA,
Complainant,
vs.

WM. F. KETTENBACH et al.,
Defendants.

Notice of Motion [for Order Opening Causes].

NOTICE OF MOTION.

To the Above-named Defendants, Jas. E. Babb, Geo.
W. Tannahill, Your Attorneys, and to Each of
You:

YOU WILL PLEASE TAKE NOTICE that the undersigned, solicitor for complainant, will on the 26th day of April, 1911, before the above-entitled court in the Federal Courtrooms, city of Boise, Idaho, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, *will* move the Court for an order opening the above-entitled causes for the purpose of introducing additional and newly

discovered testimony, in accordance with motion herewith served upon you, together with this notice. Upon the hearing of said motion counsel will use notice of motion; the motion and the affidavit attached to said motion; all the files and records in the above-entitled causes or so much thereof as may be necessary.

PEYTON GORDON,
Solicitor for Complainant. [120]

Service of the above notice, together with a copy of the motion and the attached affidavit thereto, acknowledged by receipt of copies this 20th day of April, 1911.

GEO. W. TANNAHILL,
Solicitor for Defendants.

J. E. BABB,
Solicitor for Certain Defendants.

[Endorsed]: Filed April 20, 1911. A. L. Richardson, Clerk. [121]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

IN EQUITY—Nos. 388, 406 and 407.

UNITED STATES OF AMERICA,
Complainant,

vs.

WM. F. KETTENBACH et al.,
Defendants.

Motion [for Order Opening Causes].

MOTION.

Comes now Peyton Gordon, Special Assistant to

the Attorney General, solicitor for the complainant in the above-entitled causes, and moves the Court for an order opening the above-entitled causes for the purpose of including in the record in said causes additional and newly discovered evidence, as based upon the affidavit hereto attached to this motion and made a part hereof.

PEYTON GORDON,
Special Assistant to Attorney General. [122]

[Affidavit of Peyton Gordon.]

State of Idaho,
County of Ada,—ss.

Peyton Gordon, being first duly sworn, on oath deposes and says he is Special Assistant to the Attorney General of the United States, and alleges for the complainant in the above-entitled causes, that on the 24th day of October, 1910, the testimony in the above-entitled causes was closed and that the time for preparing and filing briefs in the same on behalf of the complainant has been extended to and including May 20, 1911; that since the closing of said causes, new and additional testimony has been discovered, which said testimony is relevant, important and material in proving the allegations of complainant's Bills of Complaint; further, that said testimony is indispensable for the proper presentation of said causes to the Court on the allegations in said bills as aforesaid; that said additional testimony was discovered after the closing of the taking of the testimony in said causes as aforesaid and could not with due diligence have been discovered

before, and in truth and in fact the existence of such additional testimony was not known to your affiant and could not have been known with all due diligence until a date subsequent to the closing of said testimony as aforesaid; that such newly discovered testimony is of the following nature:

A deposit slip of the Lewiston National Bank, Lewiston, Idaho, which is as follows:

THE LEWISTON NATIONAL BANK,
Lewiston, Idaho.

Deposited by Kittie E. Dwyer,

4-26-1904. [123]

two checks	
given to	
Wiggin for	
cash.....	98.00
50	
48	2.00
—	

Less cash..... 96.00

And on the back of said deposit slip:

Guy Wilson.....	8
Greenberg.....	8
Bingham.....	8
McMillan	8
Mrs. Rowlands.....	8
J. O'Keefe	8
Prentice.....	8
E. Taylor	8
Dammorell	8

vs. William F. Kettenbach et al. 4703

Mrs. Justice	8
C. W. Taylor.....	8
F. Justice	8
	<hr/>
	96
J. O'Keefe	8
	<hr/>
	88

The purpose of the introduction of this exhibit and the evidence related and incident thereto is to support the allegations of plaintiff's Bills of Complaint and show that the defendants, Kester and Kettenbach, paid the filing fees in the land office at Lewiston, Idaho, upon the timber claims of the persons whose names are enumerated on the back thereof.

PEYTON GORDON.

Subscribed and sworn to before me this 20th day of April, 1911.

A. L. RICHARDSON,
Clerk.

[Endorsed]: Filed April 20, 1911. A. L. Richardson, Clerk. [124]

*In the District Court of the United States for the
District of Idaho, Central Division.*

Case No. 407.

UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
and WILLIAM DWYER,

Defendants.

Decree.

This cause coming on again to be heard upon the Bill of Complaint, the Answer thereto, and the replication of the complainant to such Answer, and upon the proofs taken and heard in said cause, and upon the report of Warren Truitt, Esq., Referee, to whom the said cause was referred to take the testimony and report the same to the Court; and the arguments by solicitors for complainant and defendants; upon due consideration of the pleadings and the evidence and such arguments, the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED that this suit be and the same is hereby dismissed out of court for want of equity, and that neither party recover costs.

AND IT IS SO ORDERED.

Dated this 15th day of April, A. D. 1912.

FRANK S. DIETRICH,
Judge of U. S. Court.

[Endorsed]: Filed April 15, 1912, A. L. Richardson, Clerk. [125]

*In the District Court of the United States for the
District of Idaho, Central Division.*

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

**WILLIAM F. KETTENBACH, GEORGE H. KES-
TER, and WILLIAM DWYER,**
Defendants.

Petition for Appeal.

To the Judge of the District Court of the United States, for the District of Idaho:

Your petitioner, the United States of America, the complainant in the above-entitled cause, lately pending in the court above named, respectfully represents and shows that in said cause there was entered at the February term of said court in the year 1912, on the 15th day of April, 1912, a final decree greatly to the prejudice and injury of your said petitioner, by which said decree the bill of complaint filed by your said petitioner as complainant in said cause was dismissed, and which said decree is erroneous and inequitable in many particulars, some of which are specified and assigned as errors by your petitioner in an assignment of errors lately filed by your said petitioner in the said cause, in the office of the Clerk of said Court.

Wherefore, to the end that your said petitioner may obtain relief in the premises and have opportunity [126] to show the said errors complained of, and that the said errors may be corrected and the said decree reversed, your said petitioner prays that it may be allowed in the said cause an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and that proper orders to the allowance of such an appeal may be made by this Court.

GEO. W. WICKERSHAM,

Attorney General of the United States,

PEYTON GORDON,

Special Assistant to the Attorney General,

Solicitors for Complainant.

[Endorsed]: Filed Sept. 16, 1912. A. L. Richardson, Clerk. [127]

*In the District Court of the United States for the
District of Idaho, Central Division.*

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH and Others,

Defendants.

Assignment of Errors.

Now comes the United States of America, the complainant in the above-entitled cause, and, with a view to the obtaining and the prosecution of an appeal from the decree lately entered in the said cause in the court above named, files this the said complainant's assignment of errors in the said decree, as stating and designating the errors in the said decree, upon which the said complainant intends to rely in such prosecution of the said appeal.

And the said complainant assigns for such errors and says that the said United States District Court in rendering and entering the said decree erred in these matters and things, that is to say:

I. That the said Court erred in dismissing the bill of complaint filed by the said complainant in the said cause. [128]

II. That the said Court erred in not granting by decree appropriate to that end the relief prayed

by the said complainant in the bill of complaint, as amended, filed by said complainant in the said cause.

III. That the Court erred in failing to find from the evidence in said cause that the defendants named in the said bill of complaint as amended had conspired among themselves, with each other, and with divers other persons named therein and named and indicated in the evidence, to defraud the United States in the manner and for the purposes stated and charged in said bill of complaint as amended, and that the said defendants did so defraud the United States in such manner and in respect of the lands of the United States designated and described in the said bill.

IV. That the said Court erred in finding and in holding that the preponderance of the evidence is against the theory that the defendants, Kester, Kettenbach and Dwyer, were jointly interested in the acquisition of title to the lands involved in this cause, as set out and described in complainant's bill of complaint as amended.

V. That the said Court erred in finding and in holding that the defendants did not have any knowledge or reason to believe that Harvey J. Steffey had any unlawful arrangement or understanding with the entrymen named and mentioned in said bill of complaint as amended.

VI. That the said Court erred in failing to find and to hold that Harvey J. Steffey was the agent of [129] the said defendants in procuring the entries involved in complainant's bill of complaint as

amended to be made in fraud of the United States, and in fraud of the laws of the United States.

VII. That the said Court erred in failing to find and to hold that the defendants had reason to believe, and had knowledge of the fact that Harvey J. Steffey had unlawful arrangements, understandings and agreements with all of the entrymen mentioned and named in said bill of complaint as amended, relative to the acquisition and disposition by said entrymen of the lands contained in their entries as charged in said bill of complaint.

VIII. That the said Court erred in finding and in holding in effect that the defendants, Kester and Kettenbach, purchased the lands designated and described in complainant's bill of complaint as amended, under such circumstances as constituted the said defendants innocent purchasers of the said land in good faith, for value and without knowledge or notice of any fraud or other illegality in the title to the said lands.

IX. That the Court erred in finding and holding that the allegations in said complainant's bill of complaint as amended are not sustained by the testimony and evidence in said cause, and that there are no equities therein.

GEO. W. WICKERSHAM,

Attorney General of the United States,

PEYTON GORDON,

Special Assistant to the Attorney General,

Solicitors for Complainant.

[Endorsed]: Filed Sept. 16th, 1912. A. L. Richardson, Clerk. [130]

*In the District Court of the United States for the
District of Idaho, Central Division.*

IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H. KES-
TER, and WILLIAM DWYER,
Defendants.

Order Allowing Appeal.

This day came The United States of America, the complainant in the above-entitled cause, and presented its petition for an appeal and an assignment of errors accompanying the same, which petition, upon consideration of the Court, is hereby allowed, and the Court allows an appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

September 23d, 1912.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Sept. 23, 1912. A. L. Richardson, Clerk. [131]

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

IN EQUITY—Nos. 388, 406, 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH and Others,
Defendants.

Stipulation [Concerning Taking of Testimony and Evidence].**STIPULATION.**

WHEREAS, Special Examiners heretofore have been appointed by the Court to take and hear the testimony in all of the above-entitled causes, and each of said causes charge conspiracy to defraud the United States of certain of its timber lands, and the Bill of Complaint in each of said causes specifically describes the several tracts of land sought to be recovered by the Government, and refers to the several patents sought to be cancelled;

With the view of speeding said causes to a hearing, and for the purpose of economy in the taking of the testimony in said causes, and making of the record in the same for the Court, it is hereby stipulated and agreed by and between the respective parties to the above-entitled causes that the testimony of all of the witnesses of all the parties to the said causes produced and taken before said examiners heretofore appointed, or before any examiners or persons hereafter appointed by said Court, or agreed upon between the parties to these causes to act in such capacity in all of said causes shall be considered as having been taken in each and all of said causes, and shall go to make up the record in each and all of said causes, with the same force and effect as though said causes were consolidated, subject, however, to the defendants' objection made at the time of the introduction of any evidence so offered that the same is incompetent, irrelevant and immaterial.

It is further stipulated by and between the parties to said causes that the evidence offered by and on behalf of any of said parties in any of said causes shall be considered as offered and [132] received in evidence in all of said causes unless at the time of the offering of said evidence the party so offering the same shall specifically specify as to which of said causes the same is offered.

(Signed:) PEYTON GORDON,

Special Assistant to the Attorney General,
Solicitor for Complainant.

JAMES E. BABB,

Solicitor for Lewiston National Bank, Idaho Trust Company, Potlatch Lumber Company, Clearwater Timber Company, Frank W. Kettenbach, Defendants.

GEO. W. TANNAHILL,

Solicitor for William F. Kettenbach, George H. Kester, William Dwyer, Elizabeth White, Edna P. Kester, Martha E. Hallett, Kittie E. Dwyer, Defendants.

MORGAN & MORGAN,

Solicitors for Western Land Company, Defendant.

EUGENE A. COX,

Solicitor for Elizabeth Kettenbach, Curtis Thatcher, Elizabeth W. Thatcher, and Elizabeth White, Defendants. [133]

**[Stipulation Concerning Memoranda and Abstract
of Exhibits.]**

*In the Circuit Court of the United States for the
District of Idaho, Northern Division.*

IN EQUITY—No. 388.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. F. KETTENBACH et al.,

Defendants.

IN EQUITY—No. 406.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. F. KETTENBACH et al.,

Defendants.

IN EQUITY—No. 407.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. F. KETTENBACH et al.,

Defendants.

It is hereby stipulated by and between the parties to the above-entitled causes that the memoranda and abstract of the exhibits in said causes, hereto attached, consisting of pages numbered consecutively from 1 to 321, shall have the same force and effect as though said exhibits were copied in full in the tran-

script of the record of said causes on appeal to the Circuit Court of Appeals for the Ninth Circuit, provided, however, that any party claiming any error or omission in the said memoranda and abstract, or desiring to have any original document heretofore offered in evidence in any of said causes submitted to said Circuit Court of Appeals, may without application to said Court of Appeals have any such original document sent by the Clerk to the Clerk of said Court of Appeals, and any such claimed error or omission shown by a copy certified by the [134] Clerk below and filed with the Clerk of said Court of Appeals, with two copies thereof and a copy thereof served personally or by U. S. mail on the adverse party, and that any matter so supplied shall have like effect as if supplied on order of said Court of Appeals.

Dated this 12th day of December, A. D. 1912.

PEYTON GORDON,

Special Assistant to the Attorney General,
Solicitor for Complainant.

GEO. W. TANNAHILL,

Solicitor for Defendants William F. Kettenbach,
George H. Kester, William Dwyer, Elizabeth
White, Edna P. Kester, Martha E. Hallett and
Kitty E. Dwyer.

JAMES E. BABB,

Solicitor for Defendants, Clearwater Timber Com-
pany, Lewiston Nat'l Bank, Idaho Trust Com-
pany and F. W. Kettenbach.

EUGENE A. COX.

CLARENCE W. ROBNETT,

Defendant.

[Endorsed]: Filed Dec. 14, 1912. A. L. Richardson, Clerk. [135]

**[Order Allowing Withdrawal of Original Exhibits
for Use in Circuit Court of Appeals.]**

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

IN EQUITY—Nos. 388, 406, 407.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM F. KETTENBACH et al.,
Defendants.

It is hereby ordered, that the following original exhibits, to wit: Plaintiff's Exhibits 6s, 6u, 6t, 80, 84, 85, 104, 105, 106, 118, 119, 120; and Defendant's Exhibits "B-1," "A," "B," "C," "D," "Y," "Z," and "A-1" (affidavit of Effie A. Jolley); and "A-2," "F-1," "H-1," "I-1," "L-1," "M-1," offered in evidence at the trial of said causes, be allowed to be withdrawn from the files of this court, for the purpose of being transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the record on appeal to the said United States Circuit Court of Appeals, in these causes to be returned to the Clerk of this Court, upon the termination of said appeal.

Dated at Boise, Idaho, December 2d, 1912.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed December 2d, 1912. A. L. Richardson, Clerk. [136]

*In the District Court of the United States Within
and for the District of Idaho, Central Division.*

IN EQUITY—#407.

UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH, GEORGE H.

KESTER, and WILLIAM DWYER,

Defendants.

Citation [on Appeal].

CITATION.

United States of America,—ss.

The President of the United States, to William F. Kettenbach, George H. Kester, and William Dwyer, and to George W. Tannahill of Lewiston, Idaho, Their Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the District Court of the United States, within and for the District of Idaho, Central Division, wherein the United States of America is Plaintiff, and you, William F. Kettenbach, George H. Kester, and William Dwyer are the defendants in error, to show cause, if any there be, why the judg-

ment in said appeal mentioned should not be corrected, and speedy justice not be done to the parties in that behalf. [137]

WITNESS the Honorable FRANK S. DIETRICH, Judge of the United States District Court in and for the Central Division, District of Idaho, this 23d day of September, A. D. 1912.

FRANK S. DIETRICH,

District Judge.

[Seal]

Attest: A. L. RICHARDSON,

Clerk.

Service of the within Citation and receipt of a copy thereof admitted this — day of September, 1912.

.....,

.....,

Attorney for Defendants.

Recd. copy of foregoing this 26th day of Sept., 1912.

GEO. W. TANNAHILL,

Atty. for Defendants. [138]

United States of America,

District of Idaho,

Central Division,—ss.

I hereby certify that I served the within and foregoing Citation upon Willam Dwyer on September 26, 1912, and upon William F. Kettenbach on October 1, 1912, at Lewiston, Nez Perce County, in the District of Idaho, Central Division, by then and there delivering to the said William Dwyer and William F. Kettenbach, personally, a true copy of the within Citation.

And I further certify that I served the within Citation on George W. Tannahill, attorney for the Defendants, on the 26 day of September, 1912, at Lewiston, County of Nez Perce, District of Idaho, Central Division, by then and there delivering to the said George W. Tannahill, personally, a true copy of the within Citation.

Dated at Lewiston, in the District of Idaho, Central Division, this 4th day of October, 1912.

S. L. HODGIN,
United States Marshal.
By Wm. Schuldt,
Deputy.

After due search and diligent inquiry I have been unable to find George H. Kester within the District of Idaho. [139]

[Endorsed]: No. 407. In the District Court of the United States for the District of Idaho, Central Division. United States of America vs. William F. Kettenbach et al. Citation. Filed October 17th, 1912. A. L. Richardson, Clerk.

H. Civ. 518 9/24/12. [140]

Return to Record.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Cir-

cuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. [141]

[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]

*In the Circuit Court of the United States in and for
the District of Idaho, Northern Division.*

BILL IN EQUITY—No. 407.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

WILLIAM F. KETTENBACH, GEORGE H.
KESTER, WILLIAM DWYER,
Defendants in Error.

The United States of America,
District of Idaho,—ss.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript consisting of pages numbered from 1 to 143, inclusive, to be a full, true and correct copy of the record and proceedings in the said court in a certain suit in equity therein lately depending, wherein the United States of America is the complainant, and William F. Kettenbach and (George H. Kester and William Dwyer) are defendants, and numbered four hundred seven, as the same remain of record and on file in the office of the Clerk of said court.

I further certify that the testimony, exhibits or opinion of the Court were filed in the case, but the same were filed in the office of the Clerk of said court in case entitled United States of America vs. William F. Kettenbach and (George H. Kester, William Dwyer, Clarence W. Robnett and Frank W. Kettenbach) and numbered three eighty-eight, which was tried and heard with this case and another case entitled United [142] States of America vs. William F. Kettenbach and (George H. Kester, Clarence W. Robnett, William Dwyer, The Idaho Trust Company, The Lewiston National Bank of Lewiston, Idaho, The Clearwater Timber Company, The Western Land Company, George E. Thompson, Elizabeth W. Thatcher, Curtis Thatcher, Elizabeth White, Edna P. Kester, Elizabeth Kettenbach, Martha E. Hallett, Kittie E. Dwyer, Potlatch Lumber Company, Robert O. Waldman), and numbered 406, in accordance with the stipulation of the parties to the said three causes, all of which are now on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, a copy of which stipulation is set out in the transcript hereto attached.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court this sixteenth day of December, A. D. 1912.

[Seal]

A. L. RICHARDSON,

Clerk. [143]

[Endorsed]: No. 2211. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. William F. Ket-

tenbach, George H. Kester, and William Dwyer, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Central Division.

Filed December 19, 1912.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**[Order Extending Time to December 19, 1912, to
File Transcript in Circuit Court of Appeals.]**

*In the District Court of the United States Within
and for the District of Idaho, Central Division.*

IN EQUITY—#407.

UNITED STATES OF AMERICA,

Complainant,

vs.

WILLIAM F. KETTENBACH et al.,

Defendants.

On the application of the Acting Attorney General of the United States, for good cause shown, and it further appearing to the Court that the transcript in this cause is voluminous and cannot be prepared within thirty days from and after the signing of the Citation in said cause,

IT IS THEREFORE ORDERED, that the time for filing said transcript in the Circuit Court of Appeals be and is hereby extended sixty days from

and after the 20th day of October, A. D. 1912.

Dated this 23d day of September, A. D. 1912.

FRANK S. DIETRICH,

District Judge.

[Endorsed]: No. 407. In the District Court of the United States, District of Idaho, Central Division. The United States of America, Complainant, vs. William F. Kettenbach et al., Defendants. Order Extending Time for Filing Transcript.

No. 2211. United States Circuit Court of Appeals for the Ninth Circuit. No. 407. In the District Court of the United States for the District of Idaho. United States of America, Complainant, vs. William F. Kettenbach et al., Defendants. Order Extending Time for Filing Transcript. Filed Oct. 3, 1912. F. D. Monckton, Clerk. Refiled Dec. 19, 1912. F. D. Monckton, Clerk.

**[Order Enlarging Time to December 26, 1912, to File
Record Thereof and to Docket Cause in Circuit
Court of Appeals.]**

*In the District Court of the United States for the
District of Idaho, Central Division.*

THE UNITED STATES OF AMERICA,
Appellants,

vs.

WILLIAM F. KETTENBACH et al.,
Respondents.

For good cause shown, it is hereby ordered that the time to file the transcript and docket the above-

entitled cause in the U. S. Circuit Court of Appeals be and the same is hereby extended and enlarged from the 19th day of December, 1912, to and including the 26th day of December, 1912.

Dated December 19, 1912.

FRANK S. DIETRICH,

Judge.

[Endorsed]: No. 407. In the District Court of the United States, District of Idaho, Central Division. The United States, Appellant, vs. William F. Kettenbach et al., Respondents. Order Extending Time to File Transcript., Clerk.

No. 2211. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Including Dec. 26, 1912, to File Record Thereof and to Docket Case. Filed Dec. 23, 1912. F. D. Monckton, Clerk.

At a Stated Term, to wit, the October Term A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the thirteenth day of January, in the year of our Lord One Thousand Nine Hundred and Thirteen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge; Honorable WILLIAM C. VAN FLEET, District Judge.

No. 2209.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER, CLARENCE W. ROBNETT, WILLIAM DWYER and FRANK W. KETTENBACH,

Appellees.

**Order Consolidating Cases for Hearing and
Argument in Circuit Court of Appeals, etc.**

This case coming to be heard upon motion of the appellant for an order to consolidate with it the case of the United States of America, Appellant, vs. William F. Kettenbach, George H. Kester, Clarence W. Robnett, William Dwyer, The Idaho Trust Company, The Lewiston National Bank, The Clearwater Timber Company, Elizabeth W. Thatcher, Curtis Thatcher, Elizabeth White, Edna P. Kester, Elizabeth Kettenbach, Martha E. Hallett, and Kitty E.

Dwyer, Appellees, No. 2210 upon the docket of this court, and also the case of the United States of America, Appellant, vs. William F. Kettenbach, George H. Kester and William Dwyer, No. 2211 upon the docket of this court, with this case, and upon good cause being shown and counsel for the respective parties consenting thereto, it is hereby ordered that the cases hereinbefore mentioned be consolidated with this case for hearing and argument in this court, and that the record of all of said cases be printed in one record, and that one set of briefs shall suffice for said three cases.

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
IN FOURTEEN VOLUMES.

THE UNITED STATES OF AMERICA,

Appellant,

No. 2209.

vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
CLARENCE W. ROBNETT, WILLIAM DWYER,
and FRANK W. KETTENBACH,

Appellees.

THE UNITED STATES OF AMERICA,

Appellant,

No. 2210.

vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
CLARENCE W. ROBNETT, WILLIAM DWYER,
THE IDAHO TRUST COMPANY, a Corporation,
THE LEWISTON NATIONAL BANK, a Corpora-
tion, THE CLEARWATER TIMBER COMPANY,
a Corporation, ELIZABETH W. THATCHER,
CURTIS THATCHER, ELIZABETH WHITE,
EDNA P. KESTER, ELIZABETH KETTEN-
BACH, MARTHA E. HALLETT, and KITTY
E. DWYER,

Appellees.

THE UNITED STATES OF AMERICA,

Appellant,

No. 2211.

vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER
and WILLIAM DWYER,

Appellees.

VOLUME XIV.—INDEX.

Appeals from the District Court of the United States for the
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Nos. 2209, 2210 AND 2211.

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
IN FOURTEEN VOLUMES.

THE UNITED STATES OF AMERICA,

Appellant,

No. 2209.

vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
CLARENCE W. ROBNETT, WILLIAM DWYER,
and FRANK W. KETTENBACH,

Appellees.

THE UNITED STATES OF AMERICA,

Appellant,

No. 2210.

vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
CLARENCE W. ROBNETT, WILLIAM DWYER,
THE IDAHO TRUST COMPANY, a Corporation,
THE LEWISTON NATIONAL BANK, a Corpora-
tion, THE CLEARWATER TIMBER COMPANY,
a Corporation, ELIZABETH W. THATCHER,
CURTIS THATCHER, ELIZABETH WHITE,
EDNA P. KESTER, ELIZABETH KETTEN-
BACH, MARTHA E. HALLETT, and KITTY
E. DWYER,

Appellees.

THE UNITED STATES OF AMERICA,

Appellant,

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vs.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
and WILLIAM DWYER,

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Nos. 2209, 2210, and 2211..

In the United States Circuit Court of
Appeals for the Ninth Circuit.

No. 2209.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
WILLIAM F. KETTENBACH, GEORGE H. KESTER, CLAR-
ENCE W. ROBNETT, WILLIAM DWYER, AND FRANK
W. KETTENBACH, APPELLEES.

No. 2210.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
WILLIAM F. KETTENBACH, GEORGE H. KESTER, CLAR-
ENCE W. ROBNETT, WILLIAM DWYER, THE IDAHO
TRUST COMPANY, A CORPORATION; THE LEWISTON
NATIONAL BANK, A CORPORATION; THE CLEAR-
WATER TIMBER COMPANY, A CORPORATION; ELIZA-
BETH W. THATCHER, CURTIS THATCHER, ELIZABETH
WHITE, EDNA P. KESTER, ELIZABETH KETTEN-
BACH, MARTHA E. HALLETT, AND KITTY E. DWYER,
APPELLEES.

No. 2211.

THE UNITED STATES OF AMERICA, APPELLANT.
v.
WILLIAM F. KETTENBACH, GEORGE H. KESTER, AND
WILLIAM DWYER, APPELLEES.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.*

BRIEF ON BEHALF OF APPELLANT.

FILED

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In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPEL-
lant,

v.

WILLIAM F. KETTENBACH, GEORGE H. KES-
ter, Clarence W. Robnett, William Dwyer,
and Frank W. Kettenbach, appellees.

} No. 2209.

THE UNITED STATES OF AMERICA, APPEL-
lant,

v.

WILLIAM F. KETTENBACH, GEORGE H. KES-
ter, Clarence W. Robnett, William Dwyer,
The Idaho Trust Company, a corporation,
The Lewiston National Bank, a corpora-
tion, The Clearwater Timber Company,
a corporation, Elizabeth W. Thatcher,
Curtis Thatcher, Elizabeth White, Edna
P. Kester, Elizabeth Kettenbach, Mar-
tha E. Hallett, and Kitty E. Dwyer, ap-
pellees.

} No. 2210.

THE UNITED STATES OF AMERICA, APPEL-
lant,

v.

WILLIAM F. KETTENBACH, GEORGE H. KES-
ter, and William Dwyer, appellees.

} No. 2211.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASES.

Between April, 1902, and April, 1909, about 9,000 acres of Government timber lands in Latah and Nez Perce Counties, Idaho, were entered under the timber and stone act of June 3, 1878 (20 Stat., 89), as amended by the act of Congress of August 4, 1892, and transferred by the entrymen, practically as fast as their entries were perfected, to one or more of the defendants, except such entries as are still held by the entrymen in trust for one or more of the defendants.

Each of the three above-entitled suits was brought by the United States against William F. Kettenbach, George H. Kester, William Dwyer, and other parties to cancel the patents to said lands on the ground that the titles thereto were obtained from the Government by said defendants in violation of the governmental policy with respect to the public lands, and contrary to the letter as well as the spirit of the timber and stone act.

In case No. 2209 sixteen different patents are attacked; in case No. 2210 thirty-eight, and in case No. 2211 eight are attacked.

The bills of complaint as amended charge that Kester, Kettenbach, Dwyer, and others about the years 1901 and 1902 entered into a conspiracy by which they were, by indirection, to acquire public timber lands in excess of the maximum amount allowed by law to any one person, and that from time to time, in effecting the purpose of such conspiracy, they joined to themselves other persons (Clarence W. Robnett, Jackson O'Keefe,

Fred Emory, C. W. Colby, and Harvey J. Steffey), and, either directly or through the persons so associated with them, entered into unlawful agreements with numerous qualified entrymen by which such persons should, ostensibly for their own use and benefit, but in reality for the use and benefit of the defendants, acquire title with the understanding that immediately or soon after the acquisition thereof they should, for a small consideration, convey it to the defendants or one of them; also that the persons procured by said defendants, their coconspirators or agents, as a part of his application to enter and as a necessary and material step in the proceedings to obtain a patent for the land sought by him to be entered, did file in the Land Office a written statement of the tenor prescribed by said act of Congress wherein such persons did falsely, fraudulently, and deceitfully swear in substance that he or she was not applying to purchase the tract of land by him or her sought to be entered *on speculation*, but in good faith to appropriate the same to his or her own exclusive use and benefit, and that he or she had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he or she should acquire from the Government of the United States should inure in whole or in part to the benefit of any persons except him or herself, whereas in truth and in fact each of said persons was applying to enter the tract by him or her sought to be entered *on speculation*, and not in good faith for his or her own exclusive use and benefit, and had made an unlawful agreement with the said defendants whereby the title by him or her to be acquired should inure

to the use and benefit of the said defendants, to some other person or to some firm to be by said defendants designated; *and that said statements so made by the said persons, and each of them, were known by said persons and by each of them, and were known by said defendants to be false, untrue, fraudulent, and deceitful.* (Par. 14, bills of comp., Nos. 2210-2211; par. 11, bill of comp., No. 2209.)

By stipulation of all the parties to the several cases there was a consolidation in the District Court for the purpose of taking the testimony in said cases, and said cases have been consolidated by order of this court.

The district judge, in an opinion common to the three cases, held that all of the land involved in case No. 2211 was entered by the several entrymen in fraud of the statute, but that Kester and Kettenbach held the same as innocent purchasers; that a large portion of the land involved in cases No. 2209 and No. 2210 was lawfully entered, but that a number of the entries in said cases were fraudulently made. As to the latter, he held that the defendants in whom the titles thereto were vested were innocent purchasers thereof, except as to the entries of Guy L. Wilson, Frances A. Justice, and Robert O. Waldman, and these he ordered canceled.

On April 15, 1912 (pp. ———), decrees were entered dismissing the bills of complaint in cases No. 2209 and No. 2211, and canceling the patents for the entries made by the said Wilson, Justice, and Waldman in No. 2210, and dismissing the bill as to the other entries therein. It is from these decrees that appeals are taken to this court.

THE EVIDENCE.

INTRODUCTORY STATEMENT.

The District Court reached the conclusion it did by holding in effect that the witnesses Clarence W. Robnett and Harvey J. Steffey are not worthy of belief under any circumstances and in giving no weight whatever to their testimony no matter how strongly it was corroborated by contemporaneous circumstances, and in giving such weight and credibility to the testimony of Kettenbach, Kester, Dwyer, and other witnesses as though it came from entirely disinterested persons and persons of the strictest integrity and unimpeachable character. It would seem to us, therefore, not inappropriate at the outset to present to the court the more important witnesses in their true light.

At the beginning of the opinion the court announced the law on the question of the weight to be given the testimony of an accomplice and then stated that the fact that Robnett is an accomplice is not the most serious consideration affecting his credibility, as it appears from credible evidence, independent of his admissions to the same effect, that in several instances he deliberately induced entrymen to make false statements, both in their application and in their testimony upon final proof relative to entries involved in the cases, which false statements, although in some cases not constituting technical perjury, involve on the part of Robnett all the moral obliquity of perjured statements, because they were made under oath, at a time when it was assumed that such oath was authorized by law. Subsequently he was indicted and convicted of subor-

nation of perjury, in inducing entrymen in their preliminary applications in the Land Office, falsely to represent under oath, that they had personally visited the lands applied for prior to initiating their entry. The court further said that said judgment was reversed by this court for the reason that that part of the sworn statement was not authorized by statute, and therefore could not be the basis of a charge of perjury or subornation of perjury, even though the statement made was wilfully false (259-260).

The only "creditable evidence independent of his admissions" that he induced entrymen to make false statements in their application and final proof, *is that of the entrymen who made and swore falsely to such statements*, and it would seem that the same moral obliquity that attached to Robnett would also attach to them.

But as to the entrymen who swore falsely in the papers they filed in the Land Office as a part of their entry, the court said:

The immorality of such perversion of the truth is, of course, much to be deplored * * *. Under the circumstances of the case, in view of the prevalent understanding that the officers of the Land Department would not accept borrowed money, *there is no room for the inference that because the entryman perverted the truth in this particular he also falsified the facts in some other particular*" (p. 273).

The defendant Dwyer was also convicted of subornation of perjury in the same court as was Robnett and at about the same time. He induced Hiram F. Lewis

and Guy L. Wilson, witnesses in these cases, to swear falsely in their sworn statement; and said two persons and Charles Carey to swear falsely at final proof, and the judgment in that case was reversed by this court. (*Dwyer v. United States*, 170 Fed., 160, case No. 1606.)

Sentences were awarded to Robnett and Dwyer on said convictions by the district judge who wrote this opinion.

Again, in the opinion of the district court appears the following:

In the second place, after Robnett's conviction, and prior to the reversal referred to, the three principal defendants were put on trial upon the charge of conspiring to defraud the United States out of the title and possession of some of the timber lands described in the bills of complaint. At such trials Robnett was called to testify upon behalf of the defendants, and, while so testifying, under oath, in open court, he made many statements of fact which are directly contrary to, and wholly irreconcilable with, the testimony which he gave before the examiner in these cases. And again not a great while before giving his testimony before the examiner, he made affidavit to statements wholly irreconcilable with statements he made under oath. Under such circumstances, it is insisted by the defendants that it can not properly be held that the witness recognizes the sanction of an oath or has any regard therefor; and there is suggested the further question, to which testimony the greater weight should be accorded, that given at the criminal trial, favorable to the defendants, or that given in the present suits, favorable to the Government.

It is a fact that at the trial of Robnett, in November, 1906, at which he was convicted of subornation of perjury and his personal liberty was at stake, he did not take the witness stand in his own defense. (See record No. 1607, this court, *Robnett v. United States*, 169 Fed., 778.) And at the trial of the case against Kettenbach, Kester, and Dwyer, mentioned in the opinion at which Robnett testified for the defense, he was not a party defendant and his personal liberty was not at stake, he was influenced, however, to swear falsely to save Kettenbach, Kester, and Dwyer from prison.

At the trial of said case the defendants were found guilty, and the district judge who wrote the opinion in the present cases presided at the trial and imposed sentences upon the defendants. Besides Robnett, each of the defendants, Kester, Kettenbach, and Dwyer, testified in his own defense and each denied all of the evidence pointing to his guilt, thereby contradicting a great many witnesses, most of whom were entrymen and testified in the present equity proceedings. The district judge refused to hear motions for a new trial on technical grounds, but he must have been impressed with the fact that the defendants perjured themselves in giving testimony at said trial and were guilty of the offenses of which they were convicted or he would have set aside the verdict of his own motion. The judgment of the trial court was reversed by this court May 17, 1909, one of the grounds being the refusal of the trial court to hear the motions for new trial. (No. 1605, *Kester, Kettenbach, and Dwyer v. United States*, 170 Fed. 167.)

The affidavit mentioned by the court in the opinion was made by Robnett relative to the entry of Carrie D. Maris, July 1, 1909, three years after Robnett had conveyed said claim to Kester and Kettenbach in July, 1906. Therefore, Robnett was induced to make said affidavit for the defendants, and they at the time of obtaining the same having no other use for or purpose than of using it to impeach Robnett in the event he should testify to the real facts concerning the Maris entry at the retrial of the case just mentioned. It is now evident that Robnett testified truthfully in the present cases relative to the procuring of the Maris entry. The entrywoman testified to an agreement entered into between Robnett and herself before the entry was initiated, in violation of law, and the court held that the entry was made in fraud of the statute (pp. 305-306). The record shows, as we will point out hereafter, many instances where the defendants, many months after they had secured title to entries, obtained affidavits from the entrymen for similar purposes.

Again, in the opinion, the court said:

It seems that while indictments were still pending against him (Robnett) charging him with offenses connected with his land transactions, and while he was employed as bookkeeper in the Lewiston National Bank he violated the national bank laws in a number of particulars, one of such violations being the abstraction and embezzlement of divers sums of money aggregating an amount alleged to be greatly in excess of \$100,000. He was arrested on a charge of one or more of such violations and held to appear

before the grand jury. After such arrest, and prior to the convening of the grand jury, negotiations were entered into between him and the special agents of the Government, at the instance of the latter, as a result of which he appeared to have concluded to testify as a witness for the Government not only in these suits, but in the criminal cases pending against the principal defendants and others, and also before the grand jury in relation to the affairs of the Lewiston National Bank which were to be made the subject of investigation (pp. 262-263).

* * * While in the trial of the three principal defendants (Kester, Kettenbach, and Dwyer) upon the charge of conspiracy to defraud the United States in connection with the entry and acquisition of title to the timber lands herein involved (the case upon which the defendants had been convicted and that judgment reversed and a new trial ordered by this court), he testified upon behalf of the Government, his testimony being in many respects the same as that given before the examiner, and later he testified at three different trials involving charges against the defendant Kester, and the defendants W. F. Kettenbach and F. W. Kettenbach relating to the affairs of the Lewiston National Bank. In the meantime, before the trial of any of the national bank cases, the criminal charges against him growing out of his timber transactions were dismissed upon the motion of the Government (pp. 263-264).

The court thus proceeds on the theory that Robnett gave testimony in the present cases and in the national bank cases mentioned in order to protect himself, the implication being that, notwithstanding there was no

direct promise of immunity, Robnett believed that a certain amount of consideration would be shown him by the Government by reason of his testimony, and that the President had rewarded him therefor by granting him an unconditional pardon. Thus the opinion proceeds:

He (Robnett) states that no definite promise of immunity was ever made to him and possibly that he was informed by the special agents that they did not have the authority to make such agreement. With some apparent reluctance he admits that he decided to take the course which he was asked to take, and which, after some consideration, he concluded to take with the hope that in some way he would profit thereby. * * * (P. 263.)

In the absence of substantial evidence, and especially in view of the disclaimer of knowledge of any such agreement (promise of immunity in the land fraud and bank cases) upon the part of the responsible representatives of the Government, I should be loath to believe that any agreement was entered into. * * * (P. 264.)

It is wholly unimportant whether or not he had any agreement for immunity, if, as he admits to be the case, he pursued the course which he did pursue and testified for the Government with the hope of receiving favorable consideration. * * *

It is quite incredible that he did not learn from some source that the prosecution, as a rule, is not ungrateful for information furnished by persons charged with crime, and his hope that he might profit by such consideration proves not to have been entirely unfounded, for, subsequent

to his admission in the several cases, it is a matter of record in this court and common knowledge that upon his pleading guilty to each of six different counts, charging violation of the national banking laws by making false entries and false reports, and five counts, charging embezzlement or abstraction of the funds belonging to the bank, aggregating approximately \$137,000, he was promptly granted an absolute pardon (p. 265).

To the statement in the opinion that before the trial of the bank cases the indictments against Robnett growing out of his timber transactions were dismissed upon the motion of the Government, the court might have added, as it is a fact, that, at the time of the dismissal of the indictments against Robnett or shortly thereafter and before the trial of the present cases, all the indictments against the defendants, Kester, Kettenbach, and Dwyer and other persons, growing out of the land transactions in the northern division of the District of Idaho, whether they had been witnesses for or against the Government, were also dismissed. The cases referred to are:

United States v. Clarence W. Robnett. No. 601.
Filed July 13, 1905.

Charge: Subornation of perjury. Based on securing Joel H. Benton, uncle of Kettenbach, to swear falsely in connection with his entry, which is involved in the present cases.

United States v. Clarence W. Robnett. No. 621.
Filed November 6, 1905.

Charge: Subornation of perjury. Based on procuring Louis Drackman to swear falsely in connection with his timberland entry.

United States v. William B. Benton. No. 620.
Filed November 6, 1905.

Charge: Subornation of perjury. Based on procuring John H. Long to swear falsely in connection with his entry of timberland. Both Benton and Long are entrymen in the cases herein, and Benton is a cousin of Kettenbach.

United States v. Joel H. Benton. No. 602.
Filed July 13, 1905.

Charge: Perjury. Swearing falsely in making entry of his timber claim.

United States v. F. L. Shaefer. No. 603.
Filed July 13, 1905.

Charge: Perjury. Swearing falsely in making entry of a timber claim.

United States v. Rowland A. Lambdin. No. 604. Filed July 13, 1905.

Charge: Perjury. Swearing falsely in making entry of a timber claim.

United States v. George H. Kester. No. 606.
Filed July 13, 1905.

Charge: Subornation of perjury. Suborning Ivan R. Cornell to commit perjury in connection with his timberland entry.

United States v. William B. Benton, Clarence W. Robnett, and William F. Kettenbach. No. 617. Filed November 6, 1905.

Charge: Conspiracy to defraud the United States of its timberlands.

United States v. William F. Kettenbach, George H. Kester, and William Dwyer. No. 615. Filed November 6, 1905.

Charge: Conspiracy to defraud the Government of the timberlands involved in the present suits and known as the Steffey group.

United States v. Fred Emory, C. W. Colby, George H. Kester, and William F. Kettenbach. No. 618. Filed November 6, 1905.

Charge: Conspiracy to defraud the United States of its timberlands, among them are entries involved in the present cases. (This indictment had previously been dismissed as to Kester and Kettenbach.)

United States v. William Dwyer. No. 616. Filed November 6, 1905.

Charge: Subornation of perjury, in suborning Hiram F. Lewis and Guy L. Wilson to commit perjury in connection with timberland entries they were making. The latter's entry was involved in these cases and was held for cancellation by the District Court.

Notwithstanding Rowland A. Lambdin refused to testify on behalf of the Government at the trial of the defendants, though he had given evidence against them at the former trial of the same case, the indictment against him above mentioned was also dismissed. His refusal to testify on behalf of the Government in the present cases on the ground that his testimony might tend to incriminate him was after said indictment had been dismissed.

William B. Benton, Fred Emory, and C. W. Colby all testified on behalf of the defendants in the present cases, and Benton testified for the defendants at a former trial and before the indictment against him was dismissed.

In every indictment mentioned in the opinion charging Robnett with abstraction or embezzlement of funds of the Lewiston National Bank or other violations of

the national banking laws, the defendants Kester and Kettenbach were codefendants with him, either as principals or as aiders and abettors, with the exception of one in which Robnett was jointly indicted with the defendant Frank W. Kettenbach.

Some months before the trial of the present cases and before the delivery of the opinion herein, the defendants Kester and Kettenbach were tried and found guilty of violations of the national bank act in the same court in which the present cases were tried, but before a different judge. The judgment in that case was affirmed recently by this court; and the record of that case shows clearly that Kester and Kettenbach not only swore falsely in defense of themselves at the trial of said case, but that they directed and caused Robnett to make false entries in the reports to the comptroller to conceal their unlawful use of the funds of the bank, much of which was used in the timber transactions involved in the present cases.

Instances of Presidents and of governors of the several States extending executive clemency to persons having pleaded guilty to or having been convicted of crime, either before or after testifying at the trial of their coconspirators or codefendants in crime, are not uncommon. It is, however, exceedingly rare, if not entirely without precedent, for a Federal judge, in order to fortify himself in a conclusion reached, to hold in effect and by innuendo charge, though reluctantly disclaiming any such purpose, that such persons testifying under such circumstances did so because of an implied agreement or understanding with the prosecuting officer that immunity would be granted and that the

executive had immediately thereafter made good the implied agreement by granting an unconditional pardon. A striking illustration, though far more serious in its character than in the present case, occurred at the trial of the persons charged with the murder of former Governor Steunenberg. At the trial of that case the senior Senator from Idaho and the retiring governor of that State represented the prosecution. One of the codefendants, Orchard, pleaded guilty and at the trial gave evidence on behalf of the State, and in the course thereof admitted his complicity in thirty-odd murders, and sentence of capital punishment was imposed upon him. Later that sentence was commuted by the governor, now junior Senator from the State of Idaho. We do not believe, nor have we ever heard it charged except perhaps by those in sympathy with the defendants in that case, that the eminent gentlemen who conducted that prosecution promised immunity to Orchard for his testimony, or that the distinguished gentleman who granted the clemency was carrying into effect an implied agreement.

As to the witness Harvey J. Steffey, the court said:

Not only was he an accomplice in the conspiracy, but in effecting the object thereof he suborned perjury, for he knowingly induced the entrymen to commit perjury in their preliminary applications; and it is further to be noted that while acting as a witness at the final proof in several cases he made answers under oath which he knew to be untrue, and which, while possibly not constituting technical perjury, involved the moral obliquity of perjury (p. 353).

Then the court, after quoting portions of Steffey's testimony, said:

Obviously testimony so tainted can not properly be accorded the weight and force of evidence from an undefiled source (p. 356).

The court held that the eight entries procured by Steffey and involved in case No. 2211 were made in fraud of the statute. It was unwilling to hold, however, that Kester, Kettenbach, and Dwyer were acting in concert with Steffey, or that they had any knowledge of the fraudulent character of said entries. This conclusion was based largely upon testimony of Kester, Kettenbach, and Dwyer whereby they denied all complicity in the making of the entries or knowledge of the manner in which they were made.

As further reason for holding that Kester and Kettenbach were innocent purchasers for value of the entries forming the Steffey group, the court said:

Upon the one hand, it is undoubtedly true - that the defendants were acquiring timber lands, and were lending encouragement and assistance to qualified entrymen with the hope at least that they would be able to purchase the title after it passed from the Government into private ownership. * * * On the other hand, the record shows that in July, 1905, a considerable time before any one of these entries was initiated, and again in November, 1905, about the time the first entry was made (meaning the Steffey group), the defendants were indicted on charges of conspiring to defraud the United States out of its timber lands and of subornation of perjury in relation to the acquisition of title to certain timber lands. If not otherwise, the technical

requirements of the statute must have thus been forcibly brought to their attention, and they must have become conscious of the peril of participating in fraudulent acquisition of timber lands and of the risk of purchasing titles so acquired. In the absence of some powerful motive or some strong incentive it would seem to be almost incredible that men of *business and social standing* (Kester and Kettenbach) in the community would, after indictment charging certain conduct to be criminal, and after being advised that the Government was engaged in an investigation of their transactions relating to the acquisition of timber lands, lend themselves or continue to participate in a scheme violative of the very laws on which the pending indictments were based (pp. 363-364).

The undefiled character and business and social standing of Kester and Kettenbach in the community seems not to have restrained them during the period of the investigation of their land transactions and the finding of the indictments mentioned by the court, and also before and subsequent to the return of said indictments, from using large sums of the funds of the Lewiston National Bank in these very transactions and in making false entries in the reports to the comptroller in order to conceal their wrongdoing, although the penalty for violating the national banking laws is much more severe than is the punishment for violating the timberlands law; and the testimony of Steffey and the contemporaneous circumstances surrounding the making of the Steffey group of entries and the acquisition of title thereto by Kester and

Kettenbach shows conclusively that the defendants did not acquire said claims as innocent purchasers.

The court further said:

While the evidence was taken and reported by a special examiner, many of the transactions involved have been the subject of investigation in this court at different times during the last five years in connection with the criminal prosecution of the defendants, and certain of the witnesses appearing before the examiner have testified upon the same subject one or more times in the criminal trials, so that there has been some opportunity for observing *their manner of testifying and of forming some estimation of their dispositions and intelligence* (p. 258).

Notwithstanding the court's opportunity of observation as announced, it is apparent that if it observed it failed to note on a number of occasions the manner and disposition of Kester, Kettenbach, and Dwyer, and other witnesses for the defense while giving testimony, which would affect seriously the credibility and weight to be given their testimony. Furthermore, the record in the present cases shows, as we shall point out hereafter, that Kester and Dwyer time and time again suborned entrymen to perjure themselves in making their entries at the Land Office, and that Dwyer and Emory on a number of occasions, while witnesses at final proof for entrymen, gave evidence under oath which they knew to be untrue, and were guilty of "the moral obliquity of perjury." There is nothing in the opinion, however, to indicate that the testimony of the defendants and of the wit-

nesses on behalf of the defense came from other than an undefiled source.

We make no attempt to excuse Robnett. We suggest the following, however, in mitigation of his conduct. As a boy of humble origin he entered the Lewiston National Bank in the menial position of janitor and remained with that institution for seventeen years. Kester and Kettenbach were president and cashier, respectively, of said bank from 1895 until they retired in July, 1907, and during that period Robnett was the bookkeeper and did their bidding in all matters, so what he learned was while he was enjoying the social and financial surroundings of the Lewiston National Bank and under the tutelage of the defendants, Kester and Kettenbach. He engaged with them in their timber enterprises, in which they all used the funds of the bank. In order that their wrongdoing might not be discovered, he made false entries in the books of the bank and in the reports to the comptroller by their direction. Though he did not testify in his own defense, when tried for subornation of perjury, he testified falsely in defense of Kester, Kettenbach, and Dwyer in order that they might escape conviction upon the charge of conspiracy to defraud the Government of some of the lands in the present cases. After his arrest upon a warrant charging him with violating the National Banking Laws, sworn out by the defendant, Frank W. Kettenbach, he realized that it was intended that he and Chapman (assistant cashier) should alone be held responsible for the violations of law in connection with the conduct of the business of the bank. He decided to tell the

officers of the Government all that he knew of all the transactions in which he and the other defendants in these cases were engaged. At that time he had transferred all of his property to Frank W. Kettenbach, and was penniless.

All that we ask is that Robnett and his testimony and Steffey and his testimony be measured by the same legal and moral standards as are the defendants and other witnesses and their testimony in these cases.

We shall not ask that Robnett's and Steffey's evidence be given weight except when such evidence is corroborated, and any statement made in this brief based upon the testimony of either Robnett or Steffey will be so indicated.

PARTIES DEFENDANT.

The defendant William F. Kettenbach has resided at Lewiston for the last 32 years. He entered the Lewiston National Bank in 1893, and was successively remittance clerk, bookkeeper, assistant cashier, until in 1895, when he was elected president, and remained as the head of that institution until he was succeeded by his uncle, Frank W. Kettenbach, July 8, 1907 (pp. 3430, 3846).

George H. Kester was employed in various capacities in the Lewiston National Bank from 1890 to 1907, and was cashier from 1895 until he resigned in July, 1907 (p. 3141).

The defendant Clarence W. Robnett was continuously employed in the Lewiston National Bank from December, 1892, until March, 1909, with the exception of the months of August and September, 1907. He

entered the bank at the age of 17. The first two years of this period his duties were those of janitor, at \$35.00 per month, and during the last ten years of his service he was a bookkeeper. When he first entered the bank, Frank W. Kettenbach was cashier and George H. Kester was assistant cashier (pp. 2202, 2203, 2204).

The defendant Frank W. Kettenbach, uncle of William F. Kettenbach, began work in the Lewiston National Bank as bookkeeper in 1885, worked in different positions in the bank and finally became its president, resigning about January, 1896 (p. 3577). He was again elected president of the Lewiston National Bank in July, 1907, and served in that capacity until about January, 1910 (p. 3545). He is also the president of the Idaho Trust Company and has held that position ever since the Idaho Trust Company was organized in July, 1902 (p. 3545).

The defendant William Dwyer resides at Lewiston, Idaho. He is a timber cruiser and has been engaged in that business in Michigan, Wisconsin, Minnesota, and Idaho since 1887. He has been acquainted with the defendants William F. Kettenbach and George H. Kester for about thirteen years (pp. 3298, 3299, 3303). The first cruising he did for either Kester or Kettenbach was in 1902 (p. 3366).

The defendant the Lewiston National Bank, of Lewiston, Idaho, was incorporated under the laws of the United States relating to national banks in 1883, with a capital stock of \$50,000.00. The articles of incorporation were renewed in May, 1903, for a period of twenty years. In January, 1905, its capital stock was increased to \$100,000.00 (pp. 1958, 1960).

The defendant the Idaho Trust Company, with its office at Lewiston, Idaho, was incorporated under the laws of Idaho in July, 1902. Frank W. Kettenbach, one of its incorporators, has been its president ever since it came into existence (p. 1890).

The defendant Elizabeth Kettenbach is an aunt of William F. Kettenbach (p. 1557).

The defendant Elizabeth White is the mother-in-law of William F. Kettenbach (p. 744).

The defendant Edna P. Kester is the wife of George H. Kester (p. 736).

The defendant Kittie E. Dwyer is the wife of William Dwyer (p. 1877).

The defendant Martha E. Hallett was a particular friend of George H. Kester, who was boarding with her at the time she made her timber and stone entry (p. 1593).

THE CONSPIRACY.

Robnett testified that in the spring of 1902 Kester and William F. Kettenbach became interested in the acquisition of timberlands and the matter was often discussed between them and others at the Lewiston National Bank. Because of Dwyer's knowledge of timber and his experience in that business in Minnesota, and the fact that he had already cruised a number of timber claims and had people he said he could put on them, Kester and Kettenbach, in March of that year, decided that if Dwyer were willing they would enter into a partnership with him and he would do the cruising in the woods. The three were to share equally in the profits of the undertaking (pp. 2204, 2205, 2206).

Shortly thereafter a partnership was formed between Kester, William F. Kettenbach, and Dwyer and they procured different persons to enter all the timber claims that they had at that time cruised, upon an agreement that said entrymen would convey the title they would acquire from the Government to Kester, Kettenbach, and Dwyer for \$100 or \$200 apiece, the agreement being that Kester and William F. Kettenbach would furnish all of the money incident to the making and the perfecting of said entries (p. 2208).

About the same time an agreement was entered into between William F. Kettenbach, Kester, and Robnett to the effect that at any time Kester and Kettenbach had timber claims cruised for which they did not have entrymen they could put on said claims, that they would pay \$100 or \$200 to each person Robnett would induce to make an entry upon one of such timber claims upon an agreement that said entrymen would convey the same to them after final proof (pp. 2207, 2208). As to other timber claims upon which Robnett would induce persons to make entry on his own account, it was agreed that Kester and Kettenbach would furnish him all the money that he needed for that purpose, but that they were to have the preference right over anybody else to purchase the same. In either event, Kester said, "We will treat you right in it," and "We don't take anybody up to the timber except the ones we have an understanding with that after the proof that they deed the claim over for whatever we agree with them" (pp. 2209-2210).

Robnett's testimony in the matter is as follows:

Q. Well, now state what was said [referring to conversation Robnett had with Kettenbach after relating the conversation he had overheard between Kester and Kettenbach relative to their entering in the scheme to obtain the Government's timberlands].

A. I went into the office there, Will Kettenbach's private office, and——

Q. Was that in the bank?

A. In the bank, in the President's private office, and I says, "Will, I overheard a conversation between you and George the other day, and if there is any money to be made out of the timber I would like to get in and work with you and make some money," and Will says, "Clarence, we would like to help you, but we are going into arrangements with Dwyer and George and myself," and he says, "We are to be equal partners, and I don't see any chance for you to get in, but you can have a talk with George, and we will do all we can for you."

Q. At that time or prior to that time had you heard any conversation between Mr. Kester and Mr. Kettenbach, or any plan outlined by them as to how they were to get this land?

A. Why——

(Objection.)

A. Yes; the plan that they talked over at different times there was relative to getting entrymen to file on the claims and pay them so much for their rights, and the matter was brought up at the time I had a talk with Mr. Kester, what each one was to do.

Q. Well, now, what was said at that time?

A. Well, I met George in the bank, and I said, "George, I have had a talk with Will, and he

told me to come and see you," and I told him I had overheard their conversation and heard them talking in regards to going into the timber with Bill Dwyer, and locating people on claims, and I says, "Now, if there is any way I can get into it, I am going to get in and make some money out of the timber, too," and George says, "I will be only too glad to help you out, and I want to see you make some money, but all the claims we know of at the present time that have been cruised, we have people to put on them; but if at any time we have got any timber, any claims, and you have got any entrymen or can get anybody that will locate and sell their claims to us for one or two hundred dollars we are willing to pay that. We want to know, though; we don't want to handle anyone but what we know will turn their claims over after the proof is made."

Q. Now had there—before this talk that you had had that you have detailed with Mr. Kettenbach and the one you have recited as having had with Mr. Kester, had you heard them speak of the conditions on which they would locate people on these claims?

A. Yes.

Q. Well, now, when was that?

A. That was during one of those conversations in which they discussed it there; I don't know whether it came up in that conversation which I referred to when I saw Mr. Kettenbach or the one before. It was along the line of paying the entrymen from \$100 to \$200 for their right.

Q. And what was the entryman to do?

(Objection.)

A. The entryman was to go into the timber with Mr. Dwyer and see the claim, come back and file, prove up, and deed the claim over to whoever Kester and Kettenbach designated. They were to furnish all the expenses.

Q. Now, did you know of any one particular locality in which they were to operate?

A. At that time it was around the Potlatch and the Pierce City district.

Q. That was in Idaho?

A. Yes.

Q. Now, I will ask you whether or not these entrymen that you have referred to as having heard talked about, what were they to sell to make this \$150 to \$200?

(Objection.)

A. The timber claims they was to prove up on, to be located on by Bill Dwyer.

Q. I will withdraw the question and ask you what the conversation was relative to that point, that you have detailed as hearing between Mr. Kester and Mr. Kettenbach?

A. Well, the entryman was to file on a claim, and for his right he was to receive \$100 to \$200 when he deeded his claim over after proof.

Q. Now, when you saw Mr. Kester, what did he say to you when you spoke with him about conversation you had had with Mr. Kettenbach?

A. He said, "Clarence, we don't see how you can get in with us at the present time, though, on account of the timber we have cruised, that we know about, that we have entrymen for at the present time, we have entrymen for that that will sell their right for one to two hundred dollars; but if you can furnish us any more at any time when we haven't any entrymen, we

will treat you right in it, as long as you don't interfere with anything we have under headway or any of the claims we want. If you want to locate anybody and go into it on your own hook, it is perfectly satisfactory to us, and we will see that you get all the money that you need; but any time that you have any claims in your control that we want, why, we want to have the preference right over anybody else."

Q. Now, was anything further said at that time as to the arrangements they had with the people?

A. He says, "We don't take anybody up to the timber except the ones we have an understanding with that after proof that they deed the claim over for whatever we agree to give them." It would range from \$100 to \$200, according to the entryman (pp. 2206-2210).

* * * * *

Q. Did you take any care, Mr. Robnett, of the character of people that you would locate on these claims?

A. Yes; I never located anybody but what I had the handling of their claims—that is, would have the right to sell the claim.

Q. Did you locate anybody on any claim who wouldn't make an agreement with you before they entered it to convey it to whom you would direct?

A. No (pp. 2325-2326).

Robnett also testified that before he had any claims cruised and before he located any persons on any claims he always talked the matter over with Kester and Kettenbach, so that there would be no conflict between them as to the claims to be located or the persons to be

located upon them. Pursuant to this arrangement Robnett induced fifteen or sixteen persons to locate on claims, and the claims were later conveyed to Kettenbach, or as Kester or Kettenbach directed. The estimates of these claims were submitted to Kester and Kettenbach before the entrymen were located thereon, and they told him to "go right ahead." Some of the entries that Robnett caused to be made he tried to sell to other persons, after he had submitted the claims to Kester and Kettenbach and had their permission to do so (pp. 2327-2328).

Dwyer's version of his connections with Kester and Kettenbach relative to the timber enterprises is, that the first business he had with them in that regard was that he did some work for them cruising timber in the Potlatch country and on the St. Maries and Palouse Rivers (pp. 3298-3299), for which he was paid \$6 a day (pp. 3303, 3367); that he then worked a summer for the Clearwater Timber Company, and in the fall he began working for Kester and Kettenbach again and cruised a great deal of timber for them (p. 3304); that in 1902 he cruised some timber for Kettenbach on the Potlatch in T. 42, R. 1 E., and that there was about a section of it (pp. 3366, 3367).

The Lambdin claim in T. 42, R. 1 E., the earliest entry involved in these suits, was entered in the spring of 1902 (pp. 1969-1970) and, as will be pointed out later herein, that entry was fraudulently made and was procured by Kester, Kettenbach, and Dwyer, acting in concert.

Kettenbach, testifying for the defense as to the relations that existed between them, said that Dwyer was

employed to work for them cruising lands, estimating timber, and buying timber lands for them.

Q. Now, when did you first have Mr. Dwyer employed?

A. Oh, really, when I first took an interest in timber, you may say, up in what is known as the Potlatch country; he cruised out some claims up there, and on his recommendation they were purchased; and he cruised out some vacant land, and on his recommendation there was some scrip laid; and we grouped together a little bunch up there and finally sold them to the Potlatch Lumber Company (pp. 3431-3432).

He further testified that Dwyer was paid \$6 a day for his services and a commission on the land that he purchased for them. "Whenever there was work to do, he was the man that always did it for us, and I don't recollect whether he worked up in the Clearwater for us before he cruised out the State lands or vice versa" (p. 3432). He also said Dwyer was to have had an interest in the State land deal, and had it gone through he was to have had a fourth interest in them and Kester and Kettenbach were to have had three-fourths interest, but instead they paid him for his services (p. 3433). On cross-examination Kettenbach testified that among the first claims cruised for them by Dwyer were the claims of Cornell and Schafer about 1901 (pp. 3492, 3493, 3494), and that he suggested to one Samuel Hutchings that he should take up a timber claim (pp. 3505-3506).

Kester testified on behalf of the defense relative to the relations between himself, Kettenbach, and Dwyer as follows:

Direct:

Q. How did you come to become interested in the timber business?

A. Well, Mr. Kettenbach and I had *some funds that we wanted to invest*, and we thought we would buy some timberland (p. 3142).

* * * * *

Q. What business relations did Mr. Dwyer sustain to you and Mr. Kettenbach; what did he do for you, what class of work, and how did he do it?

A. Well, Mr. Dwyer was employed by us at different times in cruising and looking after timber, protecting it from fire, and at various times he purchased lands for us.

Q. And how was he paid?

A. On which he was paid a commission, and he was paid wages and compensated for his work (p. 3211).

On cross examination he testified that Dwyer was to have had a third interest in the timber on the State lands, and in response to the question whether or not Kester and Kettenbach were in partnership in the timber claims, said, "Well, we never considered it such. It was a joint interest. There wasn't a partnership; never was considered by us—we never considered that we were partners. I dare say, in the ordinary term of the expression we would be considered partners, on account of our close association, but as far as our interests were concerned there they were joint interests; he had paid his share of it and I had paid my share of the cost of it.

Q. But when the Cornell and Lambdin and Schafer claims were bought you and Mr. Ketten-

bach were purchasing timber claims under this arrangement, this joint interest, were you not?

A. Yes.

Q. And that is the way you started into it, was it not? I understood you to say that you had some funds that you and Mr. Kettenbach thought you would like to invest in timber.

A. Yes; in these matters under consideration (pp. 3231-3232).

CIRCLE K CHECKS (K).

William Dwyer expended between \$50,000 and \$120,000 of Kester and Kettenbach's money in acquiring timber claims for them. This money was expended in advancing money to entrymen to make their initial applications to file, for final proof, and in paying their expenses incident to taking up the claims, the expenses of the different persons that went out to view the timber, and in paying for said land when they conveyed it to Kester and Kettenbach (pp. 2329-2331, 2776, 3663, 2651, 2768-3221 Kester). Though Dwyer never had an account at the Lewiston National Bank, this large amount of money was drawn from the bank by what is known as the Circle K (K) checks, and the drawing of said money from the bank, as aforesaid, covered a period from 1902 or 1903 to 1907 or 1908 (pp. 2329, 2330, 2651). The Circle K (K) check was the regular blank form of the Lewiston National Bank check signed by William Dwyer, in one corner of which appeared the letter K with a circle about it, which indicated that these checks were used in the Kester-Kettenbach timber transactions and were to be charged to their account. These checks were held as cash items

at the bank for periods ranging from one to three weeks and at times until they had aggregated \$2,000 or \$3,000, when they would be taken up at the convenience of Kester and Kettenbach by the individual checks of Kester and Kettenbach, one-half the amount being paid by each, and at a later period, when they had the Kester-Kettenbach timber account, they were charged to that account or were taken up by the joint check of Kester and Kettenbach drawn on that account (pp. 2329-2332 Robnett; 2776-2780 Chapman; 3221 Kester; 3374-3375 Dwyer).

Chapman testified he did not think that the Circle K checks began before 1906, and that they amounted in the aggregate to about \$50,000. He further said these checks were taken up by Kester and Kettenbach and later went into their joint account—timber account (pp. 2777-2778). Chapman is mistaken as to the date of the beginning of these checks, as will be seen later. The timber account of Kester and Kettenbach was not opened until December 13, 1906. In 1903 and 1904 a number of instances occurred where Kester and Kettenbach deposited money to Kitty E. Dwyer's account to reimburse it when checks given by Dwyer in the timber transactions were mistakingly charged to it (pp. 1993, 3759). During the period that the Circle K checks were in use Kitty E. Dwyer, wife of William Dwyer, had an account at the Lewiston National Bank. William Dwyer also checked against this account for his personal expenses by a check similar in all respects, except that it was not marked (K). At times in drawing checks for the Kester-Kettenbach timber deals Dwyer would fail to add the (K) to the checks, and they

would be charged to the account of Kitty E. Dwyer. When this mistake would be discovered, these checks would be put back in the cash as "cash items" and a deposit slip made crediting Mrs. Dwyer's account the amount of the check mistakingly charged to her account, and the check thus returned to the cash would later be taken care of by Kester and Kettenbach (pp. 2331 to 2333 Robnett; 2778-2779 Chapman).

The following are instances of such mistakes being corrected:

On November 7, 1903, there is a deposit slip in the handwriting of George H. Kester depositing to the account of Kittie E. Dwyer \$266.55. On the margin of the deposit slip is marked "Ex. Bill by K. & K." (p. 1933). On March 30, 1906, there is another deposit ticket in the handwriting of George H. Kester depositing to the account of Kittie E. Dwyer \$320 by George H. Kester. On December 4, 1906, a deposit slip at the Lewiston National Bank was made depositing to the account of Kittie E. Dwyer \$81.25. On this check is a K in a circle and the slip is made out in Robnett's handwriting. On December 17, 1906, another slip of the same description for \$146.65 was made. On July 3, 1907, a deposit slip in favor of Kittie E. Dwyer for \$468.35 was made and marked in the margin "K. & K." This latter slip is in the handwriting of George H. Kester. On August 31, 1907, another deposit ticket was made for Kittie E. Dwyer in the sum of \$12.50 and marked "By W. F. K. account Frank Bonney." That slip is in the handwriting of W. F. Kettenbach (pp. 1993-1994). Another instance is where Dwyer had checks cashed in order that

he might give twelve entrymen \$8 each with which to pay the filing fees at the Land Office. These checks by mistake were charged at the bank to the account of Kittie E. Dwyer. It was discovered the next day that William F. Kettenbach, in order to reimburse her account in that amount, made out a deposit slip in the sum of \$96 in her favor and on the reverse side of the deposit slip are the names of the twelve entrymen (p. 3759). Further mention will be made of this transaction in connection with the entries of the persons whose names appear on said last mentioned deposit slip.

Though Kester and Kettenbach did not testify as to the aggregate amount of the Circle K checks and Dwyer said they did not amount in the aggregate to \$25,000 (p. 3375), Kester testified concerning them as follows:

I will say about the Circle K checks: Those were really as a memorandum or a sight evidence of indebtedness incurred by Mr. Dwyer and in the principal sum *for expenses or for these initial payments on lands that he might go out and contract for.*

Q. They were on the regular bank check, though?

A. Yes; they were on the bank check, and signed by Mr. Dwyer, and those checks came into the bank and were taken up by Mr. Kettenbach and myself or charged into our Kester and Kettenbach account (p. 3221).

The Kester and Kettenbach account mentioned by Mr. Kester, and also by Mr. Chapman, was opened December 13, 1906, and the first entry in that account is not a deposit but is a check charged to the same for

\$2,781.50, which created an overdraft of that amount (p. 1986), and said account continued to be overdrawn for many thousand dollars, with the exception of a small credit balance in the following March and April, until July 7, 1907, when overdrafts amounted to \$19,863.52 (pp. 1989–1990).

Notwithstanding the agreement and conspiracy entered into between Kester, Kettenbach, and Dwyer and the arrangement Robnett had with Kester and Kettenbach, as testified to by him, and Robnett's testimony as a whole, are denied by the defendants, Kester, Kettenbach, and Dwyer—a greater part of his testimony having been read by counsel for the defense to said defendants in the form of questions, and their answers being mere denials—Robnett's testimony is corroborated in part by the testimony of the defendants and other witnesses, and is fully corroborated by other contemporaneous facts and circumstances. From the testimony of the defendants themselves it appears that two bankers having funds to invest (funds of the Lewiston National Bank), in 1901 engaged in the acquisition of timber lands jointly; that from the time they first became interested in timber to the date of acquiring by them of the last claims we have any record of Dwyer, a timber cruiser, was employed by them at a salary and on commission to cruise, estimate, purchase timber for them, and to guard it against fire, and was to have an interest in certain timber they were endeavoring to secure, "and whenever there was work to do he was the man that always did it for us." The money used during the entire period by Dwyer in said enterprise was withdrawn from the Lewiston National Bank

by means of the Circle K checks. Robnett, Steffey, and O'Keefe were also permitted by Kester and Kettenbach to overdraw their accounts for the purpose of furnishing entrymen the money for incidental expenses in initiating and perfecting entries that were made for the benefit of the defendants—Kester, Kettenbach, and Dwyer or Robnett—and in instances, which will be pointed out later, in which Steffey and O'Keefe had given notes to the bank to cover such overdrafts, Kester and Kettenbach later paid such notes, each paying one-half thereof.

So call the scheme that Kester, Kettenbach, and Dwyer entered into among themselves and the arrangement that Robnett had with Kester and Kettenbach, as has been pointed out, each a conspiracy, partnership, joint interest, agency, or what not, it will be shown herein that they began the acquisition of timber lands by acting in concert in soliciting entrymen to make entries of timber lands for the defendants; that they acting in concert induced a number of persons to enter timber claims under agreements made prior to filing upon the claim; that in consideration of the defendants furnishing such persons the money with which to enter and pay for the claims and all incidental expenses, said entrymen, upon obtaining title thereto, would convey the same to the defendants, or to one of them, at fixed prices; that they acted together in contesting claims of persons who had settled upon them and after obtaining relinquishments from such persons, in locating their kinsfolk and friends upon said claims under the timber and stone act, said entrymen subsequently conveying the claims to the

defendants; that practically every dollar used in the entire enterprise was furnished the entrymen by Kester and Kettenbach or by Dwyer, Robnett, Steffey, and O'Keefe, and that the money so furnished by Dwyer, Robnett, Steffey, and O'Keefe was withdrawn from the funds of the Lewiston National Bank, of which Kettenbach and Kester were president and cashier, respectively, with the consent and connivance of Kester and Kettenbach, for which amounts, with the exception of the funds withdrawn by Robnett, they held themselves personally responsible; and they continued these relations and engaged in similar conduct to the last chapter or until the last timber claim involved in the present cases had been entered for and acquired by them; and by following their acts and transactions, step by step from the beginning to the end, the conclusion can only be that they agreed among themselves at the outset to induce entrymen to make entries in fraud of the timber-land laws and not for the sole use and benefit of said entrymen, but for the use and benefit of the defendants, and that the entries involved herein were made and conveyed to the defendants, or to one of them, or are now held for the use of the defendants pursuant to said scheme.

**PERSONS SOLICITED BY KESTER, KETTENBACH, AND
DWYER WHO DID NOT MAKE ENTRY.**

F. D. MORRISON.

In the summer of 1902 William Dwyer solicited F. D. Morrison, of Lewiston, to engage in the timber business with him. It was suggested that Morrison furnish the "grubstake and either pace or carry a

compass." Dwyer stated he had arranged with Kester and William F. Kettenbach for the necessary money to engage in this enterprise, and that Dwyer was to get 40 acres out of every 160 acres thus acquired and that Morrison was to share equally with Dwyer (pp. 1218 to 1221); and that he could make arrangements for some one to locate on the land (p. 1223), as there were always "a lot of d—— chair warmers you could buy at your own price" (p. 1220).

JOHN P. ROOS.

In 1902 or 1903 George H. Kester approached John P. Roos, a resident of Lewiston, on the streets of that place and asked him if he had been upon a certain section of timberland and inquired whether he had used his right. Roos replied in the negative, whereupon Kester asked him what he would take for his right and said he would give him \$200.00 for it (pp. 1210-1211).

SAMUEL C. HUTCHINGS.

In 1902 one of the defendants told Samuel C. Hutchings, a patrolman at Lewiston, that he would give him \$100.00 to take up a timber claim. Hutchings declined the proposition, and said he wouldn't do it, but stated that he had a friend who might accept the offer (pp. 1202, 1203, 1204). The next day he sent Rowland A. Lambdin to the defendant who had broached the subject to him. Hutchings does not, at this time, recall which of the defendants it was (p. 1204), but the record shows, as heretofore mentioned, Kettenbach made the proposition to him.

WYNN W. PEFFLEY.

In the fall of 1903 Wynn W. Peffley, while residing at Lewiston, had a conversation with George H. Kester relative to taking up a timber claim. Kester told him that there was a party leaving for the timber in a few days and that he could accompany them and that the timber claim would clear him about \$150. Two or three days later William Dwyer asked Peffley if he was ready to go, stating that a party was going out on the train that afternoon. Peffley told him that he had decided to let the matter drop. He had never talked with Dwyer about a timber claim before (pp. 1205-1207).

ANDREW J. SHERBURN.

In the summer of 1904 Dwyer asked Andrew J. Sherburn, at Lewiston, why he didn't locate on a timber claim. Sherburn responded that he had located a timber claim and also a homestead claim. Dwyer answered that that didn't make any difference, that he could take up another claim under an assumed name. Sherburn sold his homestead to William F. Kettenbach the spring or winter before he testified in these causes (pp. 1214 to 1217).

CLAIMS INVOLVED.**THE LAMBDIN ENTRY.**

Robnett heard Kester say to William F. Kettenbach in the latter's office at the Lewiston National Bank (p. 2217) that Lambdin had agreed to file upon a timber claim for \$100.00 and deed it over to him after proof. Kettenbach replied that if Kester knew that Lambdin was all right for him to go ahead and have Dwyer make

arrangements to take him in the timber; later Lambdin came to the bank and inquired of Kester where he should meet Dwyer to go to the timber and Kester answered that he would make arrangements and let him know. At the same time the subject of what Lambdin was to receive for his claim was discussed and it was arranged that Kester would pay his expenses. Lambdin wanted to know if he needed money whether it would be advanced to him and deducted from the \$100.00 he was to receive for his "right." Kester said, "I think we can arrange that all right" (pp. 2217, 2218). These conversations were before Lambdin filed upon the timber claim. Lambdin was employed in a laundry. He made his entry April 25, 1902. Shortly after Lambdin filed Kester let him have \$25.00 (p. 2219). The day Lambdin made proof he deeded the claim to Kester and William F. Kettenbach. Though at the trial in February, 1910, of Kester, W. F. Kettenbach, and Dwyer upon an indictment charging them with conspiracy to defraud the United States of a large quantity of its valuable timber lands and wherein the entry of Lambdin was alleged to have been made and conveyed to Kester and Kettenbach in fraud of the statute, Lambdin declined to testify upon the ground that any evidence he might give would tend to incriminate him, and for the same reason he refused to give evidence or to testify on the trial of these cases, he at the trial of said defendants upon the same charge in the spring of 1907 did testify on behalf of the Government and his evidence on that occasion is corroborative of the statement herein made by Robnett relative to his entry. On that occasion he testified that

he had been approached by Hutchings, and that immediately thereafter he called upon Kester at the bank, who told him he would give him \$100.00 if he would take up a timber claim and after proof deed it to them (Kester and Kettenbach), and that they would furnish all the expenses in the transaction; that he made his entry under that arrangement and conveyed the same to Kester and William F. Kettenbach the day he made proof (pp. 2154-2195, 2257-2264).

THE SHAEFFER ENTRY.

Fred W. Shaeffer made a timber and stone entry May 5, 1902. At that time he was employed as a janitor at the Lewiston National Bank (pp. 448, 449); that shortly before that time Kester asked him if he had ever taken up a timber claim and told Shaeffer that he could make \$100.00 if he would take up a claim. This conversation took place at the bank and Kester told Shaeffer to arrange his work so that he could go to the timber with Dwyer the next day. Kester told him he would pay the expenses to the timber and Shaeffer went to the timber with Dwyer the next day (pp. 450-451). Kester paid the expenses, gave him the money to pay the filing fee and for the publication (p. 454). On the day on which Shaeffer was to make final proof he advised Kester of that fact and Kester gave him \$430.00 for that purpose and suggested that when he was asked at the land office where he had received the money with which to make proof he should say he had borrowed half of it. Immediately after making proof Shaeffer returned to the bank and gave Kester his final receipt and the latter gave him \$100.00 (pp. 456, 457, 458).

The next day Shaeffer, at the request of Kester, signed a deed conveying his timber claim to Kester and William F. Kettenbach (pp. 458, 463). Robnett testified that Kester told him that Shaeffer was going into the timber and take up a timber claim and that they were going to give him \$100.00 for his right. Kester also said he had offered Shaeffer \$100.00 and told him it would help pay for a lot he had bought (in Lewiston) and he (Shaeffer) seemed very much pleased and was perfectly satisfied to sell his right for \$100.00 (p. 2222).

Apart from the entries procured by Kester, Kettenbach, and Dwyer personally, are the groups of entries known as the Robnett group, the Emory and Colby groups, the O'Keefe group, and the Steffey group. These groups take their names from the persons other than Kester, Kettenbach and Dwyer who took a prominent part in the procuring of the making of said entries and acted as agents of and in concert with Kester, Kettenbach and Dwyer throughout the transactions relative to said entries.

In the order of the dates, the next entries made, composed the Robnett group.

ROBNETT GROUP.

The entries forming this group are the Maris, William B. Benton and Joel H. Benton, initiated in the summer of 1902; the entries of Robertson, Nelson and Hansen, filed in February, 1903; the Waldman, Little, Harrington, Pierce, Bashor, the three Longs, Morrison, Hyde, Ferris, and Robinson, made in March, 1903, and the Gammon entry filed in May, 1903.

THE MARIS ENTRY.

Carrie D. Maris-Rexford made timber and stone entry July 15, 1902 (p. 2070). At that time she was employed as a clerk in a dry-goods store at Lewiston (p. 2071). Shortly before making the entry, "it was just at the time they were taking up claims," Robnett met her on the street and asked her why she didn't take up a timber claim. She replied, "How can a working girl save up money enough to take one of those timber claims?" Robnett replied that it wasn't necessary for her to have the money; that if she took up a claim he would furnish all the expense money and find a purchaser and that when she had made proof he would find a buyer and the expense money would be deducted from what the claim brought and they would divide the profits between them; Robnett stated that a great many other persons had done the same thing. That was before she viewed the claim (pp. 2072-2073). Several days later Robnett sent for her to come to the Lewiston National Bank. There she met Robnett in the directors' room and she arranged with him to take up a timber claim on the terms which he had suggested and Robnett gave her the money for expenses to the claim and return (pp. 2074-2075). Upon returning from the land she met Robnett again at the bank. He escorted her to the door of the land office, gave her sufficient money to pay the filing fees, and when the time came to make proof she again met Robnett at the bank and he gave her \$411.00. This money she took directly from there to the land office and made proof and paid the purchase price of the claim with said money (pp. 2076-

2077). Mrs. Rexford subsequently conveyed to Robnett, who in turn conveyed the claim to Kester and W. F. Kettenbach (p. 2078). In all this transaction she used but \$1.00 of her own money, and that was because on one occasion she was just \$1.00 short in some money Robnett had given her. She received \$106.00 for her claim. She was to convey the claim to whomsoever Robnett directed. That was the understanding before she viewed the claim or applied to enter it (pp. 2079–2080). Did not pay location fee. She was at the Lewiston National Bank six or seven times during the transaction (pp. 2080–2081). “A. He was to sell it, yes. He told me I had nothing to bother with at all, nothing to see to at all; he would attend to everything. That’s the way I understood it when I went up.” Deed to Robnett dated June 2, 1903 (pp. 1582–1583). The answer to question 17 at final proof of Mrs. Rexford, “Where did you get the money with which to pay for the land and how long have you had the same in your actual possession?” is, “I earned it clerking in stores; three months” (p. 2084). Robnett says Kester knew all about the arrangement he made with Mrs. Rexford and the conveyance to Kester and W. F. Kettenbach was in accordance with the previous arrangement that Robnett had with them (pp. 2283–2284). The court held that the Maris entry was made in accordance with agreement entered into between Robnett and the entrywoman before the entry was initiated, in violation of law, and that the entry was therefore invalid; that Kester and Kettenbach were not aware of the illegal agreement and their purchase of the claim was in good faith and for value in the ordinary course of business (pp. 305, 308).

THE WILLIAM B. BENTON ENTRY.

William B. Benton, son of Joel H. Benton and cousin of William F. Kettenbach, filed on a Timber & Stone claim August 27, 1902. Final certificate issued November 21, 1902. Conveyed to Robnett January, 1902 (1903) (pp. 1628-1629). Robnett testified that prior to the making of this entry Benton made an agreement with Robnett that the latter would furnish him the money to enter and purchase a timber claim and pay all incidental expenses, and that after proof was made and the property sold, after deducting the expenses, the profits would be divided between them. Robnett was to have the disposition and control of the land. It was further arranged that notwithstanding Benton did not have an account at the bank he was to draw checks upon the Lewiston National Bank for the amounts that he needed and Robnett was to protect the checks. This was done. After proof the claim was deeded to Robnett, who conveyed to Mrs. Elizabeth White, the mother-in-law of William F. Kettenbach, and she in turn conveyed to the Clearwater Timber Company. All the defendants knew of the arrangement and agreement between Robnett and Benton (pp. 2308-2309). The negotiation for the transfer to Mrs. White was conducted by the defendant W. F. Kettenbach, as was also the transfer from Mrs. White to the Clearwater Timber Company. The Clearwater Timber Company declined to take the claim directly from either Kester, W. F. Kettenbach, or Robnett, but agreed to take it if it would come through Mrs. White (pp. 2309-2310). At the time Benton made his entry he was associated with Robnett

in the timber business as a cruiser (pp. 3517 to 3519). Prior to locating on the timber claim Robnett had paid a locator to locate Benton on unsurveyed land. The court held relative to this claim that the evidence is insufficient to warrant a cancellation of the patent (p. 293).

JOEL H. BENTON ENTRY.

Joel H. Benton, uncle of W. F. Kettenbach, testified that before filing on his timber claim, he had arranged with Robnett that he would squat on a homestead in the Clearwater country on unsurveyed land and remain until it was surveyed. Robnett was to furnish him the money for all his expenses while he was there and after final proof he was to convey the land to Robnett. This arrangement was made in the directors' room at the Lewiston National Bank. Robnett carried out his part of the agreement. A Mrs. Mary Harris and her two daughters, Jeanette and Ethel, had entered into the same arrangement with Robnett, and though Joel Benton had no deposit or account at the Lewiston National Bank, he was furnished a check book by Robnett and was to draw checks on the bank for the expenses of the party during their stay on the homesteads, and Robnett was to protect the checks, and this he did (pp. 636-641), filing the sworn statement initiated entry to the timber claim of Benton, August 28, 1902. While Benton was still on the homestead before filing on timber claim, Robnett visited Benton at the homestead, and it was agreed that Robnett would furnish the money to carry him through. This Benton understood to mean that he would furnish the money for final proof on the timber claim (pp. 642, 643). Benton was not on claim

before filing. Robnett paid the filing fees and the understanding before the entry was made was that Robnett would furnish him money for final proof. On the day proof was made, Robnett did furnish Benton \$400.00 for that purpose. Benton did not give him a note or pay any interest. Later conveyed the claim to Robnett (pp. 644, 645, 646, 647). The money for the proof was given Benton in the directors' room in the Lewiston National Bank. He went directly from there to the land office and made proof (pp. 654-655). Before making proof, Robnett coached Benton as to what he should testify at the land office relative to where he had gotten the money; told him he should say the money was his, which he did at the land office. Benton admits that was not true. Also testified at the land office that he had a bank account at the Lewiston National Bank (pp. 655-656). Benton testified, "Well, my understanding was that he was to furnish me the money to prove up on, and there wasn't no understanding between him and I about that timber and stone, only as I might have thought I would let him have it, as long as he had furnished me the money. I thought I would let him have it, but I never agreed to sell that land at all. My understanding was that I was to let him have the land the same as it was with the homestead. There was nothing said about it" (pp. 660-661).

At the trial of Robnett on a criminal charge growing out of the entry of Benton, Benton testified that, "the arrangement, as I understood it, was that I was to take up the land and he was to furnish all the money, pay all the expenses, and after the expenses were taken out, it was to be divided up" (p. 654). At final proof Ben-

ton testified that the money with which he made proof he "earned selling goods" (pp. 655-656), and that he had had a bank account at the Lewiston National Bank during the last six months. At the criminal trial referred to Benton testified that he had the same agreement with Robnett relative to the timber and stone claim as he had relative to the homestead. Benton does not remember so testifying at former trial, but says, "As I said before in my last testimony there, that was my supposition in my own mind that that same thing went through, but the fact was, there wasn't a word said about selling the land to him, the timber and stone." At the trial of the present cases, the following occurred: "Q. Then when you had your first talk with Robnett about taking up a timber and stone claim, do I understand you to say that it was your understanding then that your timber and stone claim was to be taken up under the same arrangement you had as to the homestead? A. I would like to answer that by—— Mr. GORDON. Answer it yes or no, and then explain what you have to say about it. A. I can say yes in a way. Here is the way of it: I remember the question asked me, 'What do you mean by saying he would see you through?' Q. Explain now what your understanding was. A. Why, that he would furnish me the money to go ahead for final proof and expenses. I think that question was asked me. I know that question was asked me. Q. What were you to do with the land after you got your proof made? A. Well, there wasn't a word said about it. Q. What was your understanding that you were to do with it? A. Well, my understanding was he was to furnish me the money to prove

up on, and there wasn't no understanding between him and me about that timber and stone, only as I might have thought I would let him have it as long as he had furnished me the money. I thought I would let him have it, but I never agreed to sell the land at all" (pp. 659-660). "I supposed—my understanding was that I was to let him have the land" (p. 661). Robnett told him as long as he didn't have an agreement in writing it would be all right, but that related to the homestead (p. 662). Robnett testified that while Benton and the Harrises were still on their homesteads he went to see them, and on that occasion he arranged with Benton to file on a timber claim under the same arrangement that he had relative to the homestead. He told Benton that he would stand the expenses and that he would procure a purchaser, and when the property was sold they would divide the profits. This was agreeable to Benton, and the entry was made and sold under that agreement (pp. 2311, 2312). The claim was subsequently conveyed to Robnett and by him to Mrs. White and by her to the Clearwater Timber Company. Kester and W. F. Kettenbach knew of the agreement Robnett had with Benton and, for the same reasons as were controlling in the claim of Wm. Benton, the title was passed to the Clearwater Timber Company through Mrs. White (pp. 2312-2313).

The district judge said of this claim that he would be inclined to hold it for cancellation were it not for the rights of the Clearwater Timber Company as an innocent purchaser (p. 316).

THE WASHBURN ENTRY.

Pearl Washburn, who made an entry under the Timber & Stone act January 19, 1903, could not be

found. Wm. F. Kettenbach furnished her the money with which to take up the claim (2313). She made proof April 16, 1903, and on the same day gave Wm. F. Kettenbach a mortgage on the claim to secure Wm. F. Kettenbach's \$400. This mortgage and the receiver's receipt issued to her at the time she made proof were recorded at the request of Wm. F. Kettenbach two days later, April 18, 1903 (pp. 1631-1632). At final proof she swore that the money with which she purchased the land she received from her father's estate and that she had had it for three years. (Plfts. Ex., 50 G.)

This claim is not of the Robnett Group and it is mentioned here only as we are showing the evidence relative to the claims in the order of their entry. It was conveyed to one McGrane, and the title later put in the name of John E. Chapman, teller of the Lewiston National Bank, and on June 7, 1907, conveyed to the Clearwater Timber Company (p. 1515). Kettenbach says he negotiated the sale of the land from McGrane to the Clearwater Timber Company. This was done about the time that Kester and Kettenbach had been sentenced upon a conviction in the "Land Fraud Cases" and deeded all their other timber claims to the Idaho Trust Company.

THE ROBERTSON ENTRY.

Van V. Robertson made a timber-land entry February 24, 1903, made proof, and paid the purchase price for the same May 20, 1903, and on the latter date gave a mortgage to Robnett on said claim to secure a note for \$500.00 to Robnett, payable in one year (p. 791). At final proof he swore that the money

with which he paid for the claim he had made in his business and had the same in his actual possession for two years (p. 3839). Robnett testified that at the time Robertson took up the timber claim he was in the saloon business; that Roberston came to see him about entering the claim and Robnett told him he would locate him and that when it came time to make proof if he did not have the money he would get it for him. He further told him that a deal was on to sell a number of claims and that he could get him \$200.00 out of his claim as soon as the deal was closed, and that if the deed was not closed immediately after proof, he would have to give a mortgage to secure the money. It was agreed that Robnett was to control the disposition of the claim and that to make the \$200.00 Robertson was to convey the claim to whomsoever Robnett designated. That was perfectly satisfactory to Robertson (pp. 2303-2304). This conversation was before making the entry, and upon this agreement Robertson filed and made his proof. Robnett furnished him the money with which to make proof and took Robertson's note on the same day for \$500.00 and assigned the note to the Lewiston National Bank. This was done pursuant to an arrangement that Robnett had with Kester, and Kester knew of the agreement Robnett had with Robertson (p. 2305). Robertson testified that he had an interest in a cigar store and saloon, and learned through his partner in cigar business, Mr. Miller, that there was a party going to take up claim. He made arrangements with Knight to locate him, but does not know that Knight told him what he could do with the timber claim.

It was understood that if a man got a deed to the timber claim he would have a chance to sell it in a short time. It was generally understood that there would be buyers at Lewiston the same as there had been at other places. It was common talk there. That Robnett told him to make his final proof; and that he would handle it on a commission; that they would have an opportunity to sell, as they would have a large body of it together. Robertson said that he transferred his account of \$2,850 from the Camas Prairie Bank to the Lewiston National Bank December, 1902, or January, 1903 (pp. 774-781). In this Robertson is mistaken, as he did not open an account at the Lewiston National Bank until April 10, 1903; then he deposited \$100.00 (p. 2003). He said he told Robnett he didn't think he could make the proof. Robnett said it would be too bad to abandon the claim, as there was a good chance to make money out of it. He received the money with which to make proof from Robnett at the bank (pp. 784-785). Kester wrote him that the mortgage was due and he would like to have the money. Kester made the proposition to take the land and cancel the note. Robertson lost his location fee, the estimate on the timber, and the expenses of the trip to the timber (pp. 786 to 789). Robertson deeded claim to Lewiston National Bank September 27, 1904 (p. 1507).

The district judge does not comment upon the validity of this entry. He says:

He (Robnett) testified that Kester, who was the cashier of the bank, knew of his alleged illegal agreement with the entryman; this Kester

denies. It seems quite incredible that if Kester had been advised of the facts disclosing the invalidity of the transaction he would have authorized or acquiesced in the use of the funds of the bank for any such purpose; apparently there was no personal interest in the transaction to blind him to the obligations of his trust * * * But it is not easy to believe that, without hope of profit either to himself or to the bank, whose interests it was his duty to protect, Kester would have authorized the abstraction of \$500 of the bank's funds to be loaned upon real estate, the title to which he was advised was invalid by reasons of the fraud of the entryman (p. 303).

THE NELSON ENTRY.

John E. Nelson, of Lewiston, filed on a timber claim February 24, 1903. Nelson testified that H. R. Miller, deceased, who was in the cigar business with Van V. Robertson, was the first person who spoke to him about taking up a timber claim (pp. 1038-1039). Miller lived in the house with Nelson, and told the latter he felt satisfied that if he wanted a claim that he could arrange it so that he could get one. He met Robnett before filing his sworn statement, but said he had absolutely no arrangement with him (pp. 1040-1041). "Q. And did you make any arrangements with him (Robnett) about the claim? A. Absolutely none. Q. What part did he take in the transaction? A. Well, I don't know that it was anything more than a sort of a promoter, to help things along, as far as I could see. Q. Was there any arrangements made with him about the money that was to be used in paying for this claim? A. Why, Mr. Miller attended to that, as far as I was

concerned—— Q. Well, did you get your money from Mr. Miller for your expenses, etc.? A. No, I paid my own expenses. I paid all my expenses—paid the filing fees and all. Q. Did you use your own money to make your final proof? A. No, I didn't. Q. Now, from whom did you get that? A. As near as I remember, it was handed to me by Mr. Miller, and who he got it from I don't know. Q. It wasn't given to you by Robnett? A. I can't remember as to that. Q. Do you remember where you received that money? A. Yes; I believe it was in the Lewiston National Bank. Q. Now, who gave it to you there—Mr. Miller? A. Well, I am satisfied that Mr. Miller had his hands on the money. Who it came from I don't know. Q. Did you and Mr. Miller go there and get it from Mr. Robnett? A. I think we did, yes, sir." It is clear from reading the testimony that Nelson did not go upon the land before he made his entry. Wm. B. Benton located him. "Q. And did you pay him for his services? A. Yes, I think he got \$200.00 out of it. Q. Well, I know; but did you pay him anything? A. I didn't pay him myself; no. Q. And you didn't give it to anybody to pay him, did you? A. No. Nelson received \$400.00 at the Lewiston National Bank the day he made proof. Went directly from the Lewiston National Bank to the land office upstairs and made proof. Q. Now, was the matter discussed at the time that you received the money as to where you should say you got it when you went to the Land Office? A. No. Only that it was mine. Q. And who told you to say that? A. I don't remember (pp. 1041 to 1048)." He was told this by either Robnett, Benton, Knight, or Miller. It was not

a direct suggestion but indicated to his mind that he was to say that it was his money. At final proof in answer to the question whether he had paid out of his own individual funds the expenses in connection with the filing and whether he expected to pay for the land with his own money, he answered "Yes," and as to the question at final proof "where did you get the money to pay for this land, and how long have you had it in your actual possession," he answered "earned it in my trade; about one and a half years"—and the actual cash with which he purchased the land he received from Robnett a few minutes before (pp. 1050 to 1051). The same day he made a mortgage to secure the money that had been thus furnished him and later conveyed to Mr. Thatcher. Made \$60.00 in cash out of the claim (p. 1052). Never paid any interest on the note and the amount of this note was taken out at time of final settlement (p. 1057). Robnett testified that he met Nelson on the street and asked him if he didn't want to take up a timber claim. He said he did but he hadn't any money and Robnett told him he had made arrangements whereby he could take care of whatever money was needed; if he would give a note for the location fees, that Curtis Thatcher would furnish the money for the final proof and also for locations fees; that he could get him \$200.00 out of his claim. Nelson said that that would be all right and it was perfectly satisfactory, and that if he was certain that he would get that much he would file. This conversation was had before filing. Robnett was to furnish him all the money he needed except the expenses up to the timber and Robnett was to control the sale of the land (p. 2314). Robnett told

Thatcher that the money was to be furnished by him to Nelson for location fee and for final proof; that he would give a mortgage after proof and that Nelson's claim was to be included in the sale of a number of timber claims that he was bunching up to sell in a deal that was pending; told Thatcher that before any money was advanced (p. 2315). Nelson made proof May 22, 1903, and a receiver's receipt was issued to him at the same time. On that day he gave a mortgage to secure the note given for the money furnished by Robnett and on July 31, 1903, the receiver's receipt and mortgage were recorded at the request of Kester (p. 1504). Nelson deeded claim to Mrs. E. W. Thatcher May 18, 1908, while the present cases were pending (p. 1505).

The court held that in material respects the story told by Nelson relative to this claim is in conflict with the testimony of Robnett; and Thatcher denied any knowledge of the alleged agreement between the entryman and Robnett and that the evidence as a whole is insufficient to warrant cancellation of the patent (p. 302).

THE HANSEN ENTRY.

Soren Hansen, who made application to file on a timber claim February 26, 1903, testified that Robnett induced him to take up the claim. Robnett met him on the street one day before filing and asked him if he didn't want a timber claim. Hansen replied that he didn't want a claim, that he didn't have the time, and that he didn't have the money to spare. Robnett told him that he would attend to the whole matter and would furnish the money, and that it was not necessary for him to go to the land. Hansen asked what there

was in it and Robnett responded that he ought to be able to get \$300.00 to \$500.00 out of the place and that he would be able to sell it for him. Hansen told Robnett that he thought it would be all right; if he could attend to it for him and if he (Hansen) wouldn't have to go after it or furnish the money for Robnett to go ahead (pp. 514, 517, 518). Hansen had never seen the land nor had he been anywhere to look for it. Robnett at the time of filing told him that he could not get in to the land as it was covered with snow and that it was not necessary for him to see the land anyway (p. 519). Robnett took him to some attorney's office and had sworn statement prepared. Robnett furnished the money for filing fees and the \$400.00 purchase price (pp. 520-521). Never had an account at the Lewiston National Bank but Robnett gave him the money at the bank (p. 521). Subsequently on Feb. 17, 1906, at Robnett's request he executed a deed to the claim in blank and delivered it to Robnett. Nothing said as to what the purchase price would be (p. 523). Afterwards on Feb. 16, 1908, he made and executed another deed at the request of Robnett for the same claim to E. W. Thatcher (p. 522). Later made and executed another deed to the same property to Wm. F. Kettenbach March 5, 1909. Prior to executing the last-mentioned deed he executed deed to the Clearwater Timber Company (p. 523). On cross examination in response to the question whether or not the sworn statement that he did not have an agreement directly or indirectly, etc., is true, Hansen answered "Yes, it was true to the extent, unless I told him he could sell it for me or he told me he could sell it for me, unless that

infringed on that—I am not —” (p. 529). Before signing the deed to Kettenbach, delivered the deed in which the Clearwater Timber Company is grantee to Robnett. Received \$60.00 from Robnett when he conveyed to Mrs. Thatcher (p. 525). Robnett testified that he met Hansen on the street and asked him if he didn’t want to take up a timber claim. Hansen said he did but he didn’t want to use any of his money, as he needed it for his farm. Robnett told him there was a chance to make \$200.00 if he wanted to take up a claim; told him about a deal he had pending and that he would get him all the money he needed from Thatcher, that if he wanted to go ahead he would get him \$200.00 or \$250.00 out of the claim. To earn this \$200.00 Hansen was to file, make proof on the claim, give a mortgage for the money that Robnett advanced, if the property had not been sold at that time, and that Robnett was to have the handling of the claim and Hansen was to deed the claim over to whomsoever Robnett should designate and receive \$200.00. Hansen accepted this proposition, Robnett furnished all the money, and the deeds were made as above recited (pp. 2316–2317). Robnett told both Kester and Kettenbach the arrangement he had with Hansen a number of times (p. 2317). The \$60.00 Robnett gave Hansen he received from Will Kettenbach. The deed was made to the Clearwater Timber Company, because they had arrangements with the agent of that company to buy the claim, and he delivered the deed to the Clearwater Timber Company to Kettenbach (p. 2318). Hansen made proof June 5, 1903, and on the same day gave Curtis Thatcher a mortgage to secure the money Robnett had furnished

Hansen. The final receipt given at date of final proof and the mortgage were recorded at the request of Kester Oct. 10, 1903; and the deed to the Clearwater Timber Co. was recorded at the request of Wm. F. Kettenbach (pp. 1491-1492).

At final proof Hansen swore that the money with which he paid for the land he made in farming; that he had the same in his actual possession for two years; that he had a bank account at the Lewiston National Bank; and that he made a personal examination of the smallest subdivision of said land by walking over the land February 19, 1903 (pp. 3811-3812).

As to this entry the court said: "I am convinced that the entryman, who testified on behalf of the Government, desired to be entirely frank and stated the facts as he understood them, and remembered them, and according to his testimony the entry should be held to be valid" (p. 304).

THE WALDMAN ENTRY.

Robert O. Waldman made entry under the timber and stone act March 6, 1903 (p. 3729). Robnett testified that Waldman was a salesman in a variety store at Lewiston. Robnett went to his place of business and asked him if he wanted to take up a timber claim. Waldman responded that he was building a house and wouldn't take up a claim unless he could sell it right away (p. 2319). Robnett told him that if he wanted to take up a claim that he had one and that he would give him \$400.00 for his right and that he would furnish him all the money necessary for taking up the claim, and the \$400.00 would be clear. To earn his \$400.00 Waldman was to file on a timber claim, make

proof, and deed the same to Robnett as soon as the proof was made. Waldman accepted the proposition and said he was willing to sell his right for \$400.00. Robnett paid Waldman's expenses up to the timber and back and the filing fees, and at the time of final proof gave him the money for that purpose. Waldman made proof, and that afternoon or the next day made a deed and Robnett gave him \$200.00. Robnett was the grantee in the deed. Robnett in turn deeded the claim to the Lewiston National Bank (p. 2320). He negotiated for the conveyance to the bank with Frank W. Kettenbach when he left the bank. It was, however, understood that if the claim wasn't sold that it was to go to the Lewiston National Bank. That understanding was had with Robnett, Kester, and Wm. F. Kettenbach. Frank Kettenbach knew of the arrangement Robnett had with Waldman, as Robnett told him (p. 2321). Waldman on final proof testified that he purchased the land with his own money; that he earned the same clerking, and had had the same in his possession for three years (p. 3921). Waldman testified that Robnett told him he would locate him on a timber claim for \$100.00, and if Waldman would furnish the money to purchase the claim and pay all expenses incident thereto he could sell the same to whomsoever he desired; or that Robnett would furnish him the money for filing, the necessary expenses incident to going to view the claim, and the money with which to purchase the same and give him \$400.00 for his right, Waldman to make a deed to Robnett for the claim. This conversation was at the Lewiston National Bank about two weeks prior to filing on the claim.

Waldman told Robnett he much preferred to furnish his own money. A week later it developed that Waldman could not spare the money and he advised Robnett of this fact at the bank. It was then agreed that Waldman should enter the claim; Robnett to furnish all the money necessary for that purpose and to purchase the land, and all expenses incident thereto, and to pay Waldman \$400.00 for his right as soon as Waldman made a deed to Robnett of the claim. This last conversation was three or four days before Waldman filed (pp. 3726-3727). Robnett gave him \$15.00 to pay the expenses of going to view the timber. Waldman returned to Lewiston and visited Robnett at the bank again before he filed, "and he told me (Waldman) also, of course, that I was to state that there was no prior agreement to sell, and coached me on certain other questions which I have since forgotten, but, at any rate, so that I was to answer 'yes' or 'no' to the questions, according to the requirements of the application" (pp. 3728-3729). Robnett gave him the money with which to pay the filing fee and for advertising when he filed the sworn statement. Robnett notified him of the time to make proof and asked him to come to the bank to see him. Waldman went to the bank and in the directors' room Robnett gave him \$400.00 with which to make proof. On that occasion Robnett coached him as to the answers he should give to the questions asked him at final proof (pp. 3730-3731). He was to say he earned the money which Robnett had given him (p. 3731). "I (Waldman) was told what to say and what answers to make to the questions as they were put to me, stating that above

all things I must state that there was no previous agreement to sell, and that on the way down (from land office, being in the same building as the bank) I should stop in at the bank and I should sign a deed to Robnett." Robnett also told him to state that the money was his own (p. 3731). Knight and Benton were in the room with Waldman and Robnett when these instructions were given (p. 3732). The same day that he made proof he deeded the claim to Robnett and received \$150.00. He received the balance in accordance with the agreement with Robnett later (p. 3733). The whole matter turned out as he understood it in the original conversation with Robnett, he carrying out his part of the agreement and Robnett perfecting his (p. 3734). The deed from Waldman to Robnett was dated May 26, 1903 (p. 1637).

The court held this claim to be unlawfully entered and invalid and that the Lewiston National Bank, under the circumstances stated, can not claim protection as an innocent purchaser, and ordered that the patent issued for said claim be canceled (p. 290).

THE LITTLE ENTRY.

John H. Little, a clerk in a department store at Lewiston, entered a claim under the timber and stone act March 20, 1903. First talked with Robnett about taking up a claim (p. 1609). Robnett came to the store where he was working and solicited different employees to take up claims and asked him also to take up a claim. Little told him he couldn't afford it. Robnett said that he could make the arrangements so that he could afford it. Robnett told him he would see

him at lunch. He further said he had arranged with parties who would advance the money. Little wanted to know if it wasn't a little dangerous and Robnett replied, "No; everybody in the country is doing it," and named the persons whom he had induced to make entries and stated that there were a number of others going to view the land that afternoon saying "we would just like to have you go ahead and take yours this afternoon" (p. 1611). Little told him that he didn't have the money, not even to pay for the trip to the timber. Robnett said, "Well, we'll fix that all right." Robnett told him to go to Thatcher & Kling's store and Kling gave him \$15.00. He and a man named Storer gave Thatcher a note for \$15.00 each. Went into the timber with Wm. Benton and Ed. Knight. Robnett arranged for Little to go to the timber with Benton and Knight and he understood that Robnett was a partner in the locating business with them (p. 1612). In reply to the question whether he went to the timber claim, Little said they went over the mountain and plowed around through the snow a little bit and Knight said "This is about as far as we need to go," that the snow was on the ground and they couldn't see the stakes; it would be impossible. "Q. Now, what were you to do with this claim after you took it up? What was your arrangement? A. Well, the understanding was that Robnett was to find me a buyer for the claim. He guaranteed to sell the claim for me. Q. Did he tell you when he would sell it? A. Why, he said the chances were favorable for an early sale; in fact, he guaranteed an early sale—a verbal agreement was all" (p. 1613). Little never had a description of the land

but upon his return from the land Robnett, who held the descriptions of the land, took him to a lawyer's office, had the papers prepared and escorted him to the land office. Robnett paid the filing fees. Robnett notified him of the time to make proof (p. 1615). When it was time to make final proof Little went to the Lewiston National Bank. Robnett took him to the directors' room and told him that he would get him the money. Robnett then went to Kester and told him to give Little \$560.00. Little went to Kester and Kester gave him that amount and Little then went to the bookkeeper's window where Robnett was and Robnett required him to give him \$125.00 for location fees. Did not give Kester a note for the money (p. 1616). He and Robnett then left the bank, and went upstairs in the bank building to the land office and Robnett told the receiver of the land office that Little was ready to make his final proof and he then paid the receiver \$400.00 of the money he had gotten from Kester. Robnett told him to try to show at the land office that he was earning the money himself and Little asked him if it wasn't a little dangerous and he said, "No; that thing was done every day" (pp. 1717-1618). At final proof Little testified, in response to the question where he had gotten the money to pay for the land and how long he had had it in his actual possession, that he had made it selling property. Two months. He gave Robnett his final receipt that day and signed a note for \$760.00, making a bonus of \$200.00. That was immediately after he had paid the money in the land office (pp. 1618-1619). He conveyed the land to Wm. F. Kettenbach, the latter giving him \$30 over the mortgage (p. 1619). Receiver's

receipt dated June 15, 1903, and recorded at the request of Wm. F. Kettenbach June 20, 1903. Mortgage the same date recorded at the same time by Wm. F. Kettenbach. Mortgage and note made to Robnett (pp. 1620-1621). Though money was gotten from Kester, the recording of mortgage was done at request of Wm. F. Kettenbach five days after Little had gotten the money secured thereby. On cross-examination this question was asked: "Q. Had you any contract or agreement, expressed or implied, to sell your land to Clarence Robnett, at the time you made your final proof? A. Well, yes; I considered it such. He induced me to take up the claim on the promise of disposing of it for me" (p. 1625). Robnett testified that before Little filed he had told him that he was locating people on a number of claims and asked him if he didn't want to enter one. He said that he did, but he didn't have the money to go ahead. Robnett told him that he would arrange for that and pay all the expenses; that he had deals on for disposing of the timber and that he could get him from \$150.00 to \$200.00 for his claim. Little said all right, and that was prior to filing (p. 2285). Under that arrangement Little went to the timber, and returned and filed. In another place Robnett testified that he told Little he would get \$200.00 or \$250.00 for his right. That's what he would make out of it if the deal went through. Little made a mortgage to Robnett for the money furnished and Robnett assigned the mortgage and the note to Wm. F. Kettenbach without recourse the same day it was taken, right after proof; Robnett had told Kester and Kettenbach of the arrangement he had with Little

(pp. 2286-2287). The records of the office of the recorder of Nez Perce County show that the receiver's receipt issued to Little, and the mortgage Little gave Robnett were recorded by Wm. F. Kettenbach June 20, 1903, five days after their date (pp. 1705-1706).

THE HARRINGTON ENTRY.

Ellsworth M. Harrington, a brother-in-law of Robnett, entered a timber claim in March, 1903 (pp. 1347-1348). He first talked with Robnett about taking up a claim. He testified that Robnett asked him if he wanted to take up a claim. He told him he did. Harrington told Robnett he didn't have the money. Robnett said he could arrange that part of it. That was before Harrington filed (p. 1350). He thinks Robnett told him he wouldn't need to go on the timber before he filed; that he was familiar with the timber up there. Harrington made a pretense of going to the timber, however, with Wm. B. Benton and the three Longs (p. 1351). Benton had to return to Lewiston at a certain date, so they all turned back before they arrived at the timber. Later Harrington went to the bank and got a description of the land from Robnett (pp. 1352-1353). Robnett said Harrington would have to swear that he had been on the land. He thinks he paid the filing fee, but is not positive (p. 1353). The talk with Robnett relative to getting the money with which to make proof was had before he made the application to file. Nothing was said as to what there was in this transaction for him nor about selling the land. He thinks Robnett said that the land was worth about \$1,000.00. Robnett first broached the subject to him and

suggested that he would advance the money for the purpose of taking up the land (pp. 1354-1355). Robnett was dealing in timber claims, and if he had a chance to sell he had Harrington's permission to sell it. There may have been something said about Robnett assembling a number of claims, and that he had a person who was going to take them, and that he would put Harrington's claim in. "Q. You mean you didn't have any written agreement (to sell your claim)? A. No; nor no verbal agreement in that way; not positive. He was dealing in timber claims, and if he had a chance to sell it he had my permission to sell it. Q. That was the original understanding, was it not? A. I don't think there ever was any exact understanding made about it. It was a kind of a—I don't know whether you would call it a mutual agreement or not; we were brother-in-laws, and naturally, as he was in the timber business, he would handle my claim for me. Q. And you expected that, didn't you? A. Yes, sir" (pp. 1355-1356). Harrington received the money with which to make proof in the directors' room of the Lewiston National Bank, from Robnett. He thinks he got \$500.00. At that time something was said about a question that he would have to answer as to where he had gotten the money with which he was making proof and how long he had had the same in his possession. Robnett told him he would have to say he proved up with his own money, but the money he used in the land office was the money that Robnett gave him. Harrington said he stretched the truth a little when he testified that he had worked for it and had had it in his possession three or four months (pp. 1357-1358).

Two or three days later he signed a note for the \$500.00, which included the location fee, which was held out. He gave a mortgage at the same time he signed the note and later sold the claim. He received \$299.40 or \$299.60 from the claim, and Robnett negotiated the sale. He sold it to W. F. Kettenbach (pp. 1359-1360). Robnett testified that Harrington first talked with Ed. Knight and then came to Robnett's house one evening to see him about taking up a timber claim; that he, Robnett, was interested with Knight and Will Benton in the location of claims. Robnett told him if he would go ahead and locate and let him handle the claim and put through the deal the claim would net Harrington \$300.00 for his right, the balance above that to go to Robnett for his trouble. Harrington wanted to know how about the money in case the deal didn't go through, and Robnett told him that he had arrangements whereby he could get the money to pay for the location fee and pay for the final proof, Harrington to give a mortgage at that time and a note also. The understanding was that Harrington was to deed the claim to whomsoever Robnett might designate and accept the \$300.00. Harrington said that was all right; he would leave the matter in Robnett's hands and deed the claim whenever he was asked to (pp. 2321-2322). Robnett paid the location fee and says that Will Kettenbach advanced the money for final proof. Robnett negotiated with Kettenbach for the money and got the same when it came time for final proof and gave it to Harrington, who gave a note to Robnett for the amount of the location fee and money advanced and a bonus. Then Robnett endorsed the note without recourse to

Will Kettenbach. When the note was taken, at the time of final proof, the mortgage was also given, but the latter was not assigned. Kettenbach knew of the agreement between Harrington and Robnett, and Robnett had Harrington deed the claim to Will Kettenbach (p. 2323). Robnett had had previous conversations with Kettenbach about this and other matters. Robnett had some papers, memoranda, plats, and checks which he used in timber transactions in private boxes at the Lewiston National Bank. Said he had demanded the boxes of the bank and had been refused (p. 2324). "Q. Did you take any care, Mr. Robnett, of the character of the people that you would locate on these claims? A. Yes; I never located anybody but what I had the handling of their claims; that is, would have the right to sell the claims. Q. Did you locate anybody on any claim who wouldn't make an agreement with you before they entered it to convey it to whom you would direct? A. No" (pp. 2325-2326). Harrington made proof June 15, 1903, and the receiver's receipt was issued to him the same day. Harrington on the day following gave Robnett a mortgage on said claim to secure the money Robnett had furnished him. Both of these papers were recorded, at the request of Wm. F. Kettenbach, June 20, 1903, five days later (p. 1703).

THE PIERCE ENTRY.

Wren Pierce, who made a timber-land entry March 21, 1903, could not be found (p. 1428). Concerning this claim, Robnett testified that Pierce was either a carpenter or painter, a transient in Lewiston, who remained there about six months and left immediately

after he had made his proof. Arthur Barney brought Pierce to Robnett and Robnett explained the conditions under which he would furnish him a claim to file on, and Pierce stated he would be willing to go ahead and file on a claim and accept \$200.00 for his right. The conditions were that Pierce was to go up and see the claim, file, and make proof on the same. Robnett was to furnish him the money to pay expenses and final proof, then sell the claim for him and give him (Pierce) \$200.00 (pp. 2287-2288). This Pierce did, and the day he made proof Kettenbach bought the claim. No mortgage was taken. Three claims were bought outright by Kettenbach, and this was one of them. In order to get the money to pay the location fee Pierce gave his note. Robnett took the note to Curtis Thatcher, who advanced the money (p. 2289). Robnett took the money out of the bank and gave it to Pierce for final proof. Robnett negotiated the sale with Kettenbach. Kettenbach knew about the arrangements that Robnett had with Pierce. "Q. How do you know that?-- A. I told him all about it" (p. 2290). Pierce made proof June 17, 1903, and the records of the county recorder show that the receiver's receipt issued to Pierce on that day, and the mortgage he gave Robnett the same day to secure the money Robnett had furnished Pierce with which to take up the claim, were recorded by Wm. F. Kettenbach three days later. The deed to Kettenbach is dated May 31, 1904 (pp. 1428-1429, 1714). In making proof Pierce swore that the money with which he purchased the land was his; that he had worked for the same, and had had it in his possession for two months (pp. 3893, 1714).

Robnett was mistaken about Pierce not giving the mortgage. He says there were three out of eleven who, instead of giving mortgages, deeded their claims to Kettenbach directly after proof. He thinks two of the three were George Morrison and Wren Pierce (pp. 2289-2290). Three persons besides Pierce did convey to Kettenbach the claims the day they made proof. They were Joseph B. Clute, George Morrison, and Edward M. Hyde. None of the three gave mortgages to secure the money advanced them for proof, and, as will be hereafter shown, Robnett has confounded either Clute or Hyde with Pierce in this respect.

THE BASHOR ENTRY.

Benjamin F. Bashor took up a timber claim March 21, 1903 (pp. 2090-2091). Bashor testified that Robnett first spoke to him about taking up the timber claim in February of that year. Bashor refused at first, but after talking with Robnett several times he became interested, and Robnett told him that Benton and Knight were going to take a crowd to the timber on a certain day and he consented to go with them. He went to view the claim during the fore part of March. This talk was in the directors' room at the bank (p. 2092). Bashor gave his note to Robnett for the location fee either at the time he filed or at the time he made proof. The note covered the whole amount; \$400.00 for final proof and \$100.00 or \$125.00 for location fee. He paid his own expenses and paid filing fee at the land office (p. 2093). Bashor was in the directors' room of the Lewiston National Bank with Robnett twice, once just before he filed and again at the time

of final proof. Upon final proof Robnett, a few minutes later, gave him his personal check on the bank, which Bashor had cashed and used that money with which to make proof. On two different occasions Robnett suggested that the money was Bashor's (p. 2094). Before the land office Bashor testified that he had made that money while he was county assessor and that he had had it six months, which was not true. On the same day that he made proof he gave a mortgage to Robnett to secure the note and thinks that he also turned over his receiver's receipt to him. Robnett cautioned him to say at the land office that he had not borrowed the money (p. 2095). Bashor met W. F. Kettenbach on the train one day and told him he had just received a letter from Robnett relative to the timber land, and that Robnett wanted him to give a deed to the property to satisfy the note and mortgage. He told W. F. Kettenbach that Robnett wanted him to turn it over to Kettenbach. Kettenbach said he was giving about \$30.00 for these claims. Bashor thinks the amount Kettenbach mentioned was \$1,000.00, which would amount to just about \$30.00 above note and interest. He afterwards did convey the land to Wm. F. Kettenbach (pp. 2096-2097). Robnett testified in regard to Bashor's claim that he (Robnett) called him over the phone; told him the next time he came down town to come into the bank to see him, and Bashor complied with the request. Robnett told him that if he wanted to take up a timber claim that he could furnish him one. Bashor said he didn't have the money. Robnett told him to go ahead; that he would arrange for the money for the final proof. Bashor wanted to

know how much he would get out of it. Robnett told him \$200.00 or \$250.00. Robnett was to have the selling of the claim and all above the \$250.00 or \$200.00. Bashor said, "All right, then, I will go ahead and take a claim" (pp. 2290-2291). That was the arrangement between Robnett and Bashor before Bashor went to view the claim. Bashor furnished his own money for expenses in going to see the claim and gave his note for the location fee. W. F. Kettenbach furnished the money for final proof. Bashor gave note and mortgage for that also, the note and mortgage running to Robnett. The entire amount, \$725.00, was included in one note, which was given right after final proof (pp. 2291-2292). Robnett immediately endorsed the note over to Kettenbach without recourse. The mortgage was not assigned. Some time afterwards Robnett wrote Mr. Bashor, who was then at Peck, to come and see him in regard to the claim. Robnett made him an offer of a certain amount for Mr. Kettenbach, which offer Bashor accepted and deeded the claim to Wm. F. Kettenbach (p. 2292). Kettenbach knew the conditions under which Robnett was dealing with Bashor. Robnett told Kettenbach of the circumstances at the time of the location and also at the time he spoke to Kettenbach about loaning the money for final proof (pp. 2292-2293). The receiver's receipt given Bashor when he made proof June 17, 1903, and the mortgage he gave Robnett the same day were recorded by Wm. F. Kettenbach June 20, 1903, three days later (p. 1697).

THE FRANCIS M. LONG ENTRY.

Francis M. Long, father of John H. and Benjamin F. Long, made a timber-land entry March 26, 1903. He

testified that Robnett first spoke to him about taking up a timber claim (pp. 1278-1285). Robnett told him and his sons that they (meaning Benton and Knight) had some claims that could be located on. Long did not have the money with which to take up a timber claim. He borrowed it of the bank (Robnett). The agreement was that Robnett was to lend him the money to pay all expenses and to pay the Government fees; in fact, "to pay for the whole business." This was a few days before he located. Nothing was said about selling the land (p. 1280). Though before the grand jury in 1905 Long testified that Robnett told them that he had a party who would buy the claims in July, he further testified in the present cases that Robnett gave them the money in one lump sum and they gave their notes (referring to himself and sons); that Benton, Knight, and one Harrington went with them when they went to view the land (pp. 1281 to 1283). They went nine or ten miles toward the claim and Benton said it wasn't necessary for them to go any farther. They would have gone to the claim, but Benton said it wasn't necessary; they had done as much as most any of the others had done. They protested, but they returned to Lewiston (p. 1284). After their return to Lewiston, Long saw Robnett, and went to Mr. Nickerson's office and get the filing papers. He thinks they were prepared when they got there. His filing papers and the boys' (his sons) filing papers were all there together (p. 1286). He paid the fees at the land office out of the money Robnett had furnished him for that purpose. At final proof he paid some-

thing like \$400.00 at the land office (p. 1287). He thinks he must have gotten the money to make final proof from Robnett and signed the note on the same day that he made proof. Does not remember just how much he received from Robnett, but it was enough to cover all expenses (pp. 1287-1288). The money with which he paid for the land he had gotten a few minutes before from Robnett (p. 1289). Signed mortgage to Robnett for \$728.75 on day he made final proof. Long also said if he paid the location fee, Robnett gave him the money to pay it, and that was included in the mortgage. He does not remember whether he paid the location fee personally or not (p. 1290). He received \$25.00 over expenses for the claim. Sold the claim to Wm. F. Kettenbach. Made the settlement at the bank with Will Kettenbach. He never paid any interest on the note he gave Robnett, and does not know what became of it (p. 1292). Though the money with which Long purchased the land he had received from Robnett but a few minutes before, he swore at the land office in giving proof that it was his own money; that it was the proceeds of some stock he had sold and had had the same in his possession for seven or eight years (pp. 1289, 3872). Long made proof June 18, 1903, and received a receipt from the receiver of the land office that day. On the same day he executed to Robnett a mortgage on the claim for the money Robnett had furnished him. Both of these papers were recorded at the request of Wm. F. Kettenbach four days later, June 22, 1903 (p. 1294). The deed to Kettenbach is dated August 9, 1904. Consideration, \$1.00 (p. 1709).

THE JOHN H. LONG ENTRY.

John H. Long at the time he made entry of a timber claim, in March, 1903, was employed by Emory and Colby as a common laborer, \$2.50 per day. He said that Robnett first spoke to him about taking up a timber claim. He called him into the Lewiston National Bank and they talked part of the time at the window and part of the time in the directors' room about the matter (pp. 1252 to 1254). As near as he can remember it, he says the proposition Robnett made was that he would locate him on a timber claim, would loan him the money with which to prove up and would charge him \$125.00 for location fee, and Long was to pay \$200.00 for the use of this money. On the day he made proof his father and brother (Francis M. and Benjamin F. Long) went with him to the bank and gave a note payable one day after date to Robnett (pp. 1254-1255). He didn't have the money to buy a timber claim with at the time he entered the same. Robnett said that Benton would locate them (p. 1256). W. B. Benton is a cousin of Wm. F. Kettenbach. Joel H. Benton is Wm. B. Benton's father. Robnett made the arrangements with Benton to take the Longs to the timber. Ed. Knight and Ellsworth Harrington went with them (p. 1257). They went to within twelve miles of the land (p. 1258). Benton argued that it wasn't necessary to go farther, stating that if they had made an attempt that was all that was necessary. "Q. Didn't he tell you that under the arrangement under which you were taking up that timber it wasn't necessary for you to see the land?—A. Why, I think probably he did mention that" (p. 1259). The sworn

statement is dated March 26, 1903 (p. 1261). John Nickerson prepared the sworn statement, and Long does not think he read it (pp. 1261-1262). Robnett told him and his father and brother to go to Nickerson's office for the filing papers. Long did not pay for preparing the filing papers (p. 1263). Long saw Robnett again in regard to getting the \$400.00 to make proof with. He thinks it was on the same day that proof was made. He saw him at the bookkeeper's window at the bank. His father and brother were with him and he gave them the money there. His father and brother got their money at the same time (p. 1264). Long went directly to the land office and paid in the money that Robnett gave him, and made proof. Robnett said something about how they were to answer questions at the land office as to where they had gotten the money. He said it was a matter of form and it would probably be better to say it was their own money. At the land office Long swore that the money with which he paid for the land he earned working in a sawmill and other places (Pp. 1265-1266). He gave a note and mortgage to Robnett the day he made proof. The note was assigned to Kettenbach by Robnett without recourse (p. 1266). He made deed July 21, 1904, to Wm. F. Kettenbach; consideration, \$1.00 (pp. 1272 to 1274). Kettenbach gave him \$27.50 when he conveyed the claim to him (pp. 1273-1274). "Q. Do you remember whether or not in this first talk with Mr. Robnett he explained to you that you could realize about \$800 over and above all your expenses, and that he was figuring with a company who would buy your timber?—A. Yes, sir. Q. And that you asked him

when the timber would be sold, and he said some time before the end of the year?—A. Yes, sir. Q. Did you make the arrangements for your father and your brother at the same time to take up claims?—A. Yes, sir” (p. 1296). On the day Long made proof, June 18, 1903, he executed to Robnett a mortgage on his claim to secure a note for \$710.00, which Robnett endorsed to Kettenbach without recourse, as aforesaid. This and the receiver’s receipt, issued the same day, he delivered to Robnett, and both papers were recorded at the request of Wm. F. Kettenbach four days later (p. 1710). At final proof Long testified that the money Robnett had furnished but a few minutes before was his; that he earned it working in a sawmill and other places (p. 3870).

THE BENJAMIN F. LONG ENTRY.

Benjamin F. Long, son of Francis M. Long and brother of John H. Long, made a timber and stone entry in March, 1903. He testified that he was employed as a laborer on a farm, or mill hand, at wages of \$2.50 to \$3.00 per day (pp. 1297–1298). His brother, John H. Long, made all the arrangements with regard to taking up his claim, then told him about it. J. H. Long said he (Benjamin F. Long) was to get the money from Robnett and Knight (pp. 1298–1299) with which to enter the claim. Benjamin F. Long never talked with Robnett about the timber claim himself. He started out to look at the claim before he filed on it with his father and brother, Ellsworth Harrington, Benton, and Knight. They went up as far as Dent, which is about 16 miles from the claim, but he has never been on the claim. They did

not go to the claim because Benton said it wasn't necessary; that none of the others went upon the claims (p. 1300). They paid their own expenses on the trip toward the claim and Robnett paid the locating fee for them. He does not know why he paid a location fee when they didn't take him to the land (pp. 1301-1302). After they returned to Lewiston, Robnett directed him to have his filing papers prepared and Nickerson performed this service for him (p. 1302). He does not know much about this transaction as he was working at the time and did just what he was told to do in the matter, signed any papers they told him to sign. The day that he made proof he received all the money that he paid in the land office from Robnett. He does not remember the amount (pp. 1303-1304). He thinks he gave the receiver's receipt to Robnett and also signed note and mortgage that same day after he had made proof (p. 1304). He gave the note to Robnett who turned it over to W. F. Kettenbach. Kettenbach wrote them and wanted him to pay off the mortgage, and later he sold the claim to Kettenbach, but does not remember how much he got out of it. "Q. Was it \$25.00? A. Well, I couldn't say to that either. It wasn't very much, I know." Long never paid any interest on the note or any taxes on the land and never had any of his own money in the deal except his expenses on the timber and the first filing fees. He received the same amount that his father and brother got for their claims (pp. 1306-1308). Robnett gave him the money to make final proof at the Lewiston National Bank. There was something said at that time about what he was to

say at the land office, that he must say that it was his own money and that he had worked for it. This he did, but it was not true (pp. 1308-1309). His brother told him Robnett thought he could sell the claim for about \$1,500, and it was that conversation that induced him to file on the timber claim (p. 1310). When he entered the claim he thought he was going to get \$1,500 over and above all expenses, although it wasn't clear that the \$1,500 wasn't the whole amount. As the money was to be loaned him and he was not to use any of his own money he didn't pay very much attention to it. He was only interested in getting as much as he could (p. 1311). Long made proof June 18, 1903, made a mortgage to Robnett the same day to secure money Robnett had advanced to him. Receiver's receipt and mortgage were recorded at the request of W. F. Kettenbach four days later and Long conveyed claim to Kettenbach August 9, 1904 (pp. 1708-1709). At final proof Long swore that the money with which he had paid for the land and had received from Robnett the same day, he had worked for—had had the same in his actual possession for two years (p. 3876).

Robnett testified in regard to the claims of Francis M. Long, John H. Long, and Benjamin F. Long that he first spoke to John H. Long on the street; told him him he had timber claims to locate people on, and that if he wanted to go ahead and file that he could get him \$200.00 out of his claim. Long said "All right, I will think it over, and I think my father and brother want to locate also" (p. 2293). All three came to the bank to see Robnett one afternoon. Robnett went over the

whole matter with them. Told them where the timber was; that the locators would show them the claims, and when they returned to Lewiston they could go to the land office and file and after they filed they were to give Robnett a location fee or a note for it, and at the time to make their final proof they would give a mortgage to Robnett, arrangements having been made and the money would be advanced to pay for the location fee and to make proof. Robnett was to get them \$200 each out of their claims. They said that arrangement was satisfactory and filed pursuant thereto. They proved up and gave mortgages to Robnett for \$725 to \$750 each and on the same day that the notes and mortgages were given Robnett endorsed the notes to W. F. Kettenbach. Kettenbach knew about the arrangements that Robnett had with these entrymen before they filed on the land, Robnett having approached him (Kettenbach) to make loans on the timber claims and was having other conversations with him relative to the timber that Robnett was locating. Robnett afterwards assisted in getting the Longs to come to the bank and give Kettenbach deeds. The mortgages which the Longs gave to Robnett were not assigned to Kettenbach, but Robnett endorsed the notes to Kettenbach without recourse (pp. 2294-2295).

THE MORRISON ENTRY.

George Morrison, who could not be found at the time of taking testimony in these cases, entered a timber claim March 30, 1903 (p. 1634). Robnett testified that he was a carpenter and that he came to Lewiston with Wren Pierce and Edward M. Hyde, two other

entrymen. These three persons left Lewiston immediately after final proof was made, being transient artisans employed there upon some building then being constructed. Robnett testified in regard to Morrison that there were three entrymen who sold their claims (to Kettenbach and Kester) without giving mortgages; that two out of the three sold immediately upon final proof and the other later on. Morrison was one of the entrymen who sold immediately after making proof and Wren Pierce was the other (pp. 2289-2299). Robnett told Morrison that he would locate him on a timber claim, furnish him the money to pay the location fee and the amount necessary at final proof to purchase the land; that he had deals on whereby he thought he could dispose of the claim right after proof, but in the event he did not, Morrison would give him a mortgage for the money advanced, and as soon as he (Robnett) could sell the claim he would give Morrison \$200 out of it. Robnett was to pay him \$200 for his claim. This arrangement was made before Morrison had filed on the land. Robnett engaged the locator for Morrison, paid the location fee, and also the amount necessary to purchase the land. Robnett got the proof money from W. F. Kettenbach, and, instead of taking a mortgage or note to secure the same, took a deed to Kester and Kettenbach, the proof money was deducted, and Morrison was given the \$200. Kettenbach knew about the arrangement Robnett had with Morrison (pp. 2299-2301). At final proof Morrison testified at the land office that the money with which he purchased the land was his own; that he earned it at his trade and had the same in his actual possession

for two years (p. 3916). Morrison made proof June 26, 1903, and conveyed title to his claim to Kester and Kettenbach the same day. The deed was subsequently recorded by Kester (pp. 1634-1635).

THE HYDE ENTRY.

Edward M. Hyde, who, at the time of taking testimony in these cases, could not be found, made a timber-land entry March 30, 1903 (p. 1636). The evidence given by Robnett in regard to the Pierce and Morrison entries concerns also this entry. In speaking of these entries, Robnett said, "They were working, I think, on the Catholic Hospital." In regard to Hyde's specifically, Robnett said, "He was brought to me by Mr. Varney, who was a friend of mine, Varney getting \$15 out of the location fee of each entryman that he brought me. Robnett told Hyde that he would locate him on a claim in 39-3 and take his note for location fee; that he had a deal on for selling all of that timber, and that he could get him \$200 out of his claim for him "and if the deal was so that" he (Robnett) couldn't sell the claim at the time of proof he would advance him the money and he was to give Robnett a mortgage. The arrangement was satisfactory to Hyde, and Robnett furnished him all the money that was necessary to locate and purchase the claim. Knight and Benton located him. Robnett paid the location fee and Hyde filed. Robnett furnished Hyde the \$400 with which to make proof. He got this money from W. F. Kettenbach on the day proof was made. Hyde did not give a mortgage, but deeded the claim that same day to

Kettenbach and Kester. Hyde was paid \$200 for his claim, Robnett handed him the money, but W. F. Kettenbach gave Robnett the money for that purpose. Kettenbach knew of Robnett's agreement with Hyde. Robnett told him of that at the same time he told him about the arrangement he had with the other entrymen (pp. 2302-2303). At final proof, Hyde swore at the land office that the money with which he purchased the claim he had worked and mined for and had had it in his actual possession several months (pp. 3918-3919). Hyde made proof and paid for the claim June 26, 1903, on the same day he deeded claim to Kester and Kettenbach, said deed was later recorded at request of Kester (p. 1636).

THE FERRIS ENTRY.

Bertsel H. Ferris, who resides at Lewiston, made a timber-land entry March 31, 1903. He is an electrician, and at that time his salary was \$65 or \$70 per month (pp. 873-874). He testified that before making application to file he met Robnett on the street. Robnett asked him if he wanted to take up a claim. Ferris told him he did, but didn't have the money. Robnett said he could arrange for that. Ferris asked if he could get a claim for George Ray Robinson, too. Robnett thought he could. Robnett also thought he could sell the claims for them (pp. 875-876). Robnett suggested that it wasn't necessary to go on the claim and if they took the time to go to the claim it might be filed on before they had the time to make entry. This conversation was before they filed. All arrangements were made with Robnett (pp. 876-877).

Robnett gave Ferris and Robinson description of the land, and they filed without making an attempt to see the land. They think they received the filing papers in the directors' room at the Lewiston National Bank. Robnett said they would have to swear they had been on the ground. Ferris told him he had not been on the ground. Robnett told Ferris he could say he had been on the ground and it would be all right (pp. 879-880). Robnett was to furnish the money for the location estimate and final proof, and he was to sell the land (p. 881). When he made sworn statement at the land office, he swore he had been on the ground. He knew that wasn't true. Robnett and he had talked that over. Robnett notified him when it was time to make proof, and said, "Come over to the bank and I will get the money to prove up on" (p. 883), and Ferris then went to the bank with Mr. Robinson. Robnett gave them the money at the teller's window, and they went upstairs to the land office and made proof. Robinson and Ferris were in the directors' room with Robnett a couple of times. They looked over some papers. The questions they would be asked at the land office were written out on a paper and so were the answers they should make (pp. 884-885). Robnett, Robinson and Ferris went over a paper similar to the testimony of claimant on final proof and discussed the propriety of answering the questions. They went over the filing papers, too, the first time they were at the bank. He thought the final proof papers were shown them at that time also. He was given 400 and some odd dollars by Robnett with which to make proof (pp. 885-886).

He went directly from Robnett's office to the land office and made proof with the money that Robnett had given him. In the land office Ferris answered in relation to where he got the money, "Earned most of it in my trade and borrowed the balance" (p. 887). The facts were that he got the money that he paid on final proof from Robnett. He thinks Robnett and he went over that question before he went to the land office. Also answered at the land office that he expected to pay for the land with his own money. That answer also was not true. He thinks that was also discussed with Robnett (pp. 888-889). Made a note the day he got the money from Robnett for \$728.75. The note for \$125 he made on the date that he made his filing. He took the last mentioned note up with the one first mentioned (p. 889). When the note for \$728.75 was returned to him, it was endorsed by Clarence W. Robnett to Wm. F. Kettenbach without recourse. The day he made proof he gave a mortgage to Robnett to secure the payment of the note. Later Ferris deeded the land to W. F. Kettenbach, probably two years later. He didn't get any money out of the entire transaction (p. 890) and lost the money he had expended in filing fees (p. 892). Robinson was present at the conversation in the directors' room when they talked over the final proof questions (p. 893). The original understanding with Robnett was that he was to sell the land for Ferris. That understanding was had before he filed any papers. "Q. Would you have thought it right to sell to anybody but Robnett?" "A. I probably wouldn't if I had thought about it; I probably would have given him the preference (p.

900). Robnett testified that before Ferris took up his claim he approached Ferris on the street and asked him if he wanted to take up a claim. He said he did, but he had no money to pay the expenses and to file on the land. Robnett told him he had arrangements made whereby he could get the money, and he would sell the claim later for him and get him (Ferris) a couple of hundred dollars out of it. The agreement was that Ferris was to deed the land to whomever Robnett negotiated with for the sale of the claim, and Ferris was to receive \$200 for his right. Ferris accepted the proposition. Robnett took his note for the location fee and furnished him his final proof money, taking a note and mortgage on the day of final proof; also took the final receipt at the same time he took the notes. Robnett turned this note and receiver's receipt over to Kettenbach, endorsing the note without recourse. He surrendered the mortgage to Kettenbach, but didn't assign it. Kettenbach knew the arrangements Robnett had with Ferris, as Robnett told him about it at the time he made arrangements with him for all the loans; when he made arrangements to buy claims up and to furnish the money. He negotiated the transfer of the Ferris claim to Kettenbach (pp. 2296-2297). Ferris made proof on said claim June 26, 1903, and a receiver's receipt was issued to him at that time. On the same date he executed a mortgage conveying to Robnett title to his claim to secure his note of that date for \$728.75. The receiver's receipt and the mortgage were recorded at the request of W. F. Kettenbach July 1, 1903 (pp. 1701, 894).

THE ROBINSON ENTRY.

George Ray Robinson made a timber and stone filing March 31, 1903. He was an electrician, employed by Lewiston Light Company, the same company that employed Guy Wilson and Bertsel H. Ferris. His salary was either \$2 or \$2.25 a day. He testified that Bert Ferris first spoke to him about taking up a timber claim; that Robnett had some claims in view that they could get, and he went to see Robnett (pp. 1318-1319). Robnett told them (Ferris and Robinson) that claims were scarce but he had a couple that could be located on if they were fast about it and located before somebody else got to them. Robinson had no money with which to take up a claim. It was agreed that Robnett was to advance the money to make proof on the claim with and they were to pay the other expenses themselves. The claims were to be sold; that is, Robnett said he thought he had a buyer in view and when the claims were sold the locator was to have \$100 and the man that estimated the claim was to have \$125. Robinson was to get the remainder of what the claim was sold for. No price was set but Robnett said he could almost guarantee them \$500 clear, so that they could get \$500 above the selling price of the claim and expenses. That arrangement was made before they located on the land. He told them they had better file immediately because there were parties looking at claims and if they waited until they could go to see them they might be taken. They saw Robnett the next day in the directors' room of the bank and he sent them to Nickerson's office to have filing papers prepared.

They then went to the land office and filed on the claims and paid the filing fee. The arrangement with Robnett before they filed was that he had a buyer in view and he was to sell the land for them. In case he couldn't or didn't sell the land, they had the privilege of selling it to someone else. Robinson did not try to sell the claim but depended upon Robnett to make the sale for him (pp. 1319 to 1323). Robnett said he would sell the land about the 1st of September. It might have been July, that he was assembling a number of timber claims and he either had the people that were going to buy claims or he thought he would make the change and sell it to them. If it hadn't been for this arrangement with Robnett, Robinson wouldn't have taken up the claim. He gave him the description of the land he wanted him to locate on (pp. 1323-1324). He had never been up into this timber country and didn't know whether the claim he was filing on had timber on or not. At the land office he swore he had been on the land. He discussed this with Robnett. Robnett said no one would be the loser; the Government would get its money and Robinson could go and see the land afterwards and there would be no practical difference (p. 1324). Ferris and Robinson started to visit the land afterwards with Bill Benton. They went within a few miles of the claim and Benton didn't want to take them any farther (p. 1325). Robinson didn't care much about the land anyway, but he wanted to go on the land, partly for curiosity and then he would rather swear to the truth. He saw Robnett again at the bank the day they proved up and got the money from him, \$400, for that purpose,

and then went to the land office and made proof with the money Robnett had given him. The same day he gave a note to Robnett (pp. 1326 to 1328). They didn't see the claim at any time (p. 1329). Robnett and Robinson discussed the questions that would be asked him at the land office. Robnett showed them papers that had been filled out and they looked over the papers. Robnett went over several of them and Robinson and Ferris thought the answers were good enough for them (p. 1330). Ferris was with Robinson in the directors' room at the bank the day they made final proof. He does not know whether he felt free to sell this land to any one but Robnett or not (p. 1331). He didn't try to do it. He didn't have any intention of trying to; he left it all in his (Robnett's) hands. He did just exactly what Robnett told him to do during the whole transaction (p. 1332). The claim was sold to Kettenbach and Robinson realized \$71.25, the rest went to make up interest on the note (p. 1334). Fred Emory wanted Robinson to give him an option on this land. He asked Robnett if he could give the option before giving it to Emory (p. 1338). Robinson said he didn't have any agreement to sell to anyone; in explaining this he said he meant he had no person to sell it to; nobody was ever mentioned that the land was to go to, but Robnett had some one in view that he could sell it to; "He (Robnett) was to sell it; he was to sell the claims for us. If I hadn't thought he was going to take it off my hands I never should have taken it" (p. 1345). Robnett testified that Ferris brought Robinson to him. He explained the claims they had and the deals

they had on and told him he thought he could get him \$200 out of his claim and all the money for the location fee and for the final proof would be advanced; and after final proof he was to give a mortgage until the claim could be sold. He was to deed it to whomever Robnett designated when Robnett made a sale of it. Robnett talked to Robinson and Ferris at the same time. Robnett gave him the money for the locators and for final proof and took a note and mortgage for the money furnished (pp. 2298-2299). Robnett endorsed the note over to Kettenbach without recourse immediately after receiving it. Subsequently he negotiated the sale of the claim with Kettenbach. Kettenbach was advised of the arrangement Robnett had with Robinson. Robnett told him of the agreement before Kettenbach advanced the money for final proof (p. 2299). Robinson made proof June 26, 1903, and received the receiver's receipt at the same time. The same day he made a note to Robnett for \$728.75 and executed a mortgage to Robnett on the claim to secure said note. The mortgage and receiver's receipt were recorded at the request of W. F. Kettenbach, July 1, 1903. The deed to Kettenbach is dated October 16, 1905 (pp. 1116-1117).

THE GAMMON ENTRY.

Drury M. Gammon entered a timber claim May 12, 1903. At that time he was employed as waiter in hotel (p. 2101). His wages were \$40 a month (p. 2108). Robnett first spoke to him about taking up claim. Gammon testified that Robnett asked him if he wanted to take a timber claim. "I told him at first I didn't

know, and asked him how much there was in it if I wanted to take it up. He asked me if I would sell my right, and I told him 'no,' I wouldn't the way he wanted me to." He said he would see him again (pp. 2102-2103). Gammon had another talk with Robnett before he went to look at the land. Gammon told Robnett he would take up a claim and deed it to him for so much over and above expenses. He didn't state any amount at the time because he did not know what the expenses would be. Robnett was to furnish the expenses and Gammon was to deed the claim to him and get so much over and above expenses. Robnett was paying him so much for the timber on the land. That was the agreement he had with Robnett before Gammon entered the land (p. 2104). Gammon got the money to make the final proof at the bank from Robnett. It was something over \$400. With this same money he made proof (p. 2106). He remembered that he stated at the land office that the money was his and he had saved it up and had had it for six months. "Q. That wasn't exactly so, was it? A. Well, I didn't think it was any of their business where I got it at the time. Q. That wasn't exactly true? A. No; not at that time." At the time he made final proof he made a mortgage to Robnett which covered all the expenses that he had been put to in regard to this claim. Afterwards Robnett told him to make out the deed to him. He does not remember just how much Robnett gave him. He figured the expenses and what he sold the land for, and it figured that Robnett owed him \$200. Robnett gave him the \$200 (p. 2107.) "Q. Now, let's get back to the first conversation you had with Robnett

about taking up the claim. Can you hear? A. What's that? Q. You understand, do you? A. Yes. Q. Now, what did Robnett say to you? A. Oh, he just asked me if I wanted to take up a claim. Q. And what did he say there would be in it for you? A. Well, he asked me if I would sell my right for \$150.00. I told him no. Q. And how much did you tell him you would sell your right for? A. I didn't make any statement of what I would sell it for then. Q. Well, was he to furnish all the money? A. Well, the talk was then—he didn't say whether he would furnish it or not at that time. Q. And what were you to do to get the money for your right? (p. 2108). *Mr. Tannadhill*. We object to that as calling for a conclusion of the witness and not a statement of the fact. *Mr. Gordon*. Q. What were you to do to get the money, Mr. Gammon? A. Oh, he didn't tell me anything. He knew that I knew what I had to do. He knew all about how I should file on the land. Q. Well, what were you to do with that land to get that money? A. Well, he said if I wanted to I could sell it back to him. Q. Well, isn't that what you were to do to get that \$150.00? A. Well, I told him I wouldn't sell my right that way. Q. And what way were you to sell your right? A. I was to let him have it if he would give me what the land would come to after final proof; if the land had so much timber on it, why he was to give me so much a thousand, or million, or whatever it was. Q. Well, that was your arrangement before you ever went up to the land, was it? A. Yes, sir. Q. And he carried his part of the arrangement out? A. Yes, sir. Q. And you carried your part of it out? A. Yes, sir. Q. And you got a little

over \$200.00 and he got the land? A. Yes" (p. 2109). Robnett says he went to Gammon and told him if he would file on the claim in 40-3 he would advance the money, and when the claim was sold would get him \$350 out of it. That was the first conversation he had with Gammon, and he said he would file and prove up and deed the claim under those arrangements. Robnett furnished the money for the trip into the timber and for the filing fee, \$9.00, and all the money for the final proof. The final proof money he got from Kester, and when it came time for final proof he had Gammon give a mortgage to Kester. He afterwards bought the claim, and thinks he gave Gammon \$350 (pp. 2306-2307). Gammon made final proof August 19, 1903, and the deed (consideration \$1.00) to Robnett is dated October 9, 1903 (p. 2110). Robnett deeded claim to Lewiston National Bank, and negotiated the sale with Kester, to whom he told of his arrangement with Gammon (p. 2307).

Of this claim the court said: "Considering all the testimony together, I am inclined to think that at the time the entry was initiated there existed between him and Robnett an unlawful understanding as to what disposition should be made of the claims when title was secured. There remains the question whether or not the Lewiston National Bank, in taking a transfer, was an innocent purchaser for value." The court then said that Kester denies that Robnett advised him of the unlawful arrangement between him and the entryman, and that "There are no general considerations, therefore, strongly tending to impeach or weaken his testimony, and in the absence of special reasons to the contrary I

think credence must be given to his version of what occurred in preference to that of Robnett. It must therefore be held that the bank took the title without notice of its infirmity" (pp. 304-305).

The record shows, as we shall further point out, very serious general considerations tending to impeach and weaken Kester's testimony, and why credence should not be given his evidence.

SUMMARY OF EVIDENCE CONCERNING THE ROBNETT GROUP.

From the foregoing it appears that there was a slight difference in the arrangements or agreements that Robnett had with the entrymen composing his group. The arrangements or understandings in each instance, however, were made before the entry was initiated.

The agreement between Robnett and some of the entrymen was that Robnett would furnish them the money with which to initiate and perfect their entry, and that after proof Robnett would give them a stipulated amount for their right; with others Robnett was to furnish them the money with which to enter and purchase the claim and to pay all incidental expenses and that after proof Robnett would sell the claim to some person or company for whom he was assembling claims and that the entrymen would receive a stipulated amount; and in other instances Robnett was to furnish them the money with which to enter and purchase a claim, and the entryman and Robnett would divide the profits, the approximate amount of profit being mentioned. In all cases Robnett was to have the control of and disposition of the claim.

The testimony of Robnett in these respects is corroborated in large part by the testimony of the entrymen and in other respects by the circumstances attending each particular entry. All of these entrymen, with the exception of Pierce, Morrison, and Hyde, who could not be found, appeared and gave testimony in these causes; Maris, the two Bentons, Hanson, Waldman, Little, Harrington, Bashor, the three Longs, Morrison, Lewis, and Gammon were sought out and solicited by Robnett personally to enter a timber claim. Robertson and Nelson went to see Robnett, as did Pierce and Hyde, the latter two being solicited to take up a claim by one Varney, whom Robnett paid \$15.00 for each prospective entryman he secured, and Ferris at the time Robnett solicited him to make an entry arranged with Robnett for George Ray Robinson to see Robnett about a claim for himself.

Robnett furnished every one of the entrymen composing his group the money with which to purchase their claims, and to a number of them he furnished the filing fee and incidental expenses. Ten of the entrymen forming this group were not sufficiently interested in the matter to go and look at the claim they were to enter, though some of them made an excursion in the direction of the timber to lend color of good faith to their entry.

Carrie D. Maris and Waldman were in the Lewiston National Bank, or in the directors' room of that institution, to see Robnett four or five times, relative to their entries before the same were perfected; John H. Long three times; Joel H. Benton, Hanson, Harrington, Bashor, Ferris, and Robinson twice; Robertson,

Nelson, Little, Francis M. Long, and Gammon once each.

Though Robnett advanced the entrymen composing his group the money with which to purchase their claims, he received the money furnished Little, Harrington, Pierce, Bashor, the three Longs, Morrison, Hyde, Ferris, and Robinson from Wm. F. Kettenbach, and the notes that the entrymen made at that time were given to Robnett and in his name, but they were assigned to Wm. F. Kettenbach without recourse, and the mortgages were recorded at the request of Wm. F. Kettenbach three, four, or five days later in each instance; and Robnett's testimony to the effect that he received the money for eleven of this group from Kettenbach is corroborated by Kettenbach (p. 3493). Kettenbach testified that the notes were endorsed to him without recourse at his suggestion, because "I didn't consider that I wanted to hold or would hold Robnett as security for the notes, as I considered that the *security was in the claims themselves*, and I had him assign each note without recourse, so that he would not feel that he was liable in any way on it, and in this State the assignment of a note carries the assignment of the mortgage" (p. 3479).

In connection with these notes the court, commenting upon the Long entries and the mortgages they gave, each amounting to \$728.50 and one for \$710.00, said: "It is not entirely clear just what entered in the transaction to make up these several amounts. It required approximately \$400 to cover the purchase price of a claim, and Robnett was paid a location fee, and in addition to that apparently there was a *bonus* and it

is not *improbable* that the entrymen were required to give the note and mortgage for a sum considerably in excess of the money they actually procured. Whether this went to *Robnett* or to Kettenbach, or was divided up between them, or just how it did figure in the transaction, is perhaps not of vital importance" (p. 310); and again in commenting on the entries of Ferris and Robinson, all five of which are part of the Robnett group, the court said: "In each one of these cases, also, it appears that the mortgage that was given covered a *bonus of about \$200*, part of which at least it is not improbable accrued to the benefit of Robnett * * * " (pp. 323-324). The record shows that the money used by the defendants in their timber transactions was the money of the Lewiston National Bank.

The district judge has forgotten that Kettenbach, testifying at a former trial before him relative to the same notes and mortgages, said that the money advanced on said notes belonged to his relatives; that he charged a bonus because of the *poor security* and that his relatives got the bonus.

Kettenbach's testimony is as follows:

Q. Mr. Kettenbach, will you tell us all that you remember of the transaction of taking up these notes for Mr. Robnett?

A. * * * I told him I would make the loans for my folks on the same conditions that Thatcher had promised to make them. I didn't feel that I should do it for any less than what Thatcher would have done it for, and in view of the fact I was *handling my people's money*, and had been very careful to get gilt-edge securities, and *I didn't think this one at the time*, I thought

I was entitled to have my folks get the *commission* which Thatcher was to have. So I agreed with Robnett that I would take these loans for my folks, and I took them and distributed them up among my people, *and my people got the commission*. I got none of the commission out of the loan (pp. 1860-1861; Kettenbach et al. vs. U. S., No. 1605, this court).

* * * * *

Cross examination:

Q. You transacted all this business for your relatives, didn't you?

A. In regard to these nine mortgages?

Q. In regard to these questions you refer to?

A. Yes, sir (pp. 1876-1877; case No. 1605 this court).

* * * * *

Q. You want us to understand the transaction of the nine mortgages, all on behalf of some relatives of yours?

A. Yes, sir. I was handling their money.

Q. And you didn't ever make anything out of it yourself?

A. I made nothing out of the transactions except——

Q. Take that note of \$728.50 with interest at the rate of one per cent per month; they got all the note calls for?

A. They got all the note calls for.

Q. And you got the land?

A. Yes, sir; I got the land (p. 1877, case No. 1605, this court).

* * * * *

Q. You would not have accepted those loans from Mr. Robnett, considering the security was

so poor, if it had not contained a bonus of \$200, would you?

A. I probably would not.

* * * * *

Q. In other words, the great risk incident to the loan, the timber land, by reason of liability to fire, justified this bonus of \$200?

A. I think so.

* * * * *

Q. You would not have taken the loan if the bonus of \$200 was not in there?

A. No; not unless I had the note indorsed by good indorsers or had special security (p. 1883, case No. 1605, this court).

This would tend to impeach the credibility of Kettenbach and also to indicate that the deduction of the court that Robnett got the bonus was unfounded.

The note given Robnett by Robertson for the money Robnett furnished was assigned to the Lewiston National Bank at the instance of Kester, and later Robertson conveyed his claim to the Lewiston National Bank in consideration of the cancellation of the note, he thereby losing his filing fees, etc.

The money to purchase a claim was furnished Nelson by Robnett, but the mortgage to secure the same was recorded by Kester and the property was deeded to Thatcher, and Nelson received \$60.00. Thatcher acquired title while the present cases were pending.

The two Benton claims, the Waldman, and the Gammon claims were conveyed to Robnett. The Hanson, Little, Harrington, Pierce, Bashor, three Longs, Ferris, and Robinson claims were conveyed to Wm. F. Kettenbach; the Morrison and Hyde claims to Kester and Kettenbach.

Nelson received \$60.00; Hanson, \$60.00; Waldman, \$150.00; Little, \$30.00; Harrington, \$299.60; Bashor, \$30.00; Francis M. Long, \$25.00; John H. Long, \$27.50; Benjamin F. Long does not know whether he received \$25.00 or not; Morrison, \$200.00; Hyde, \$200.00; Ferris, nothing; and Robinson, \$72.25 above the amount of the note and interest for their claims.

Little saw Kester hand Robnett the money with which he purchased his claim; but the note given was assigned to Kettenbach, and Kettenbach testified that he furnished the money for Little.

From the opinion it will be observed that the court was inclined to hold the Joel H. Benton entry for cancellation were it not for the rights of the Clearwater Timber Company, which it found to be an innocent purchaser; that the Maris entry was made in accordance with an agreement between the entry woman and Robnett, but that Kester and Kettenbach were innocent purchasers (pp. 305, 308); that the Waldman entry was invalid and that the Lewiston National Bank took the same with knowledge of such invalidity; that the evidence was insufficient in the William B. Benton entry, because Benton had denied Robnett's version of the transaction; that Robnett's testimony was in conflict with that of the entryman, Nelson, who denied a prior agreement, and therefore the Nelson entry should also be held to be valid. The court was inclined to think that the Gammon entry was initiated upon agreement between the entryman and Robnett, but was led to the conclusion that the Lewiston National Bank acquired title to that claim, and also to the Van V. Robertson entry as an innocent purchaser, because it was

unwilling to believe that Kester, who negotiated the transfers to the bank, would violate his trust to that institution, whose interests it was his duty to protect (p. 303).

A reading of the testimony of Nelson and the testimony of the entrymen whom W. B. Benton located will indicate clearly that their testimony relative to their entries is entitled to no more weight than that given by Robnett in the same matter.

In holding the Hammen entry to be unlawfully made, the court said: "I am inclined to think that at the time the entry was initiated there existed between him and Robnett an unlawful understanding as to what disposition should be made of the claim when title was received" (pp. 304, 305); and in canceling the patent of the Wilson entry, the court said: "I am satisfied from the testimony of the entryman, reluctantly given, that, while there was no express agreement, there was a perfect understanding between him and the defendant *Dwyer, acting as the agent for Kester and Kettenbach*, that all expenses incident to the acquisition of title should be paid by Dwyer, and that the entryman was to receive \$150, in consideration of which he was, upon acquiring title, to convey the same to Kester and Kettenbach" (p. 286); and again, relative to the Steffey group of entries, the court said: "Though each one of them (the entrymen) while on the witness stand, categorically denied the existence of any agreement or understanding with Steffey prior to the initiation of the entry as to the disposition of the title, I am convinced by the circumstances of the case and the admitted conduct of the parties that they all made the entries with

the understanding both upon their part and upon the part of Steffey that, upon the issuance of final certificate for a definite consideration, they should convey the land to any one whom Steffey might designate * * * It is not improbable that some of them at least, by reason of the fact that the actual understanding with Steffey was not fully expressed, but was in a large measure left to interference, were led into evading, without fully appreciating that they were violating the law" (pp. 351, 352).

Were the same observations and the same measure of evidence applied in all of the entries forming the Robnett Group it would be impossible to escape the conclusion that said entries were made in fraud of the timber and stone law.

On the whole, it is clear from the testimony of the entrymen forming the Robnett Group that they did enter the claims on speculation and not in good faith to appropriate them to their own exclusive use and benefit, and also that the entries were made under an agreement or understanding with Robnett made prior to entries that the title which they might acquire from the Government should inure to Robnett, or to whomsoever he might direct.

Robnett testified that he never located anyone unless he had the right to sell the claim, or upon an agreement made before entry that the claim would be conveyed to whomsoever he would suggest. That was Robnett's understanding of what the entrymen with whom he was dealing would do with their claims, and the testimony of the entrymen, supplemented by what they did do in connection with their entries, is

conclusive that their understanding, so far as their transactions with Robnett were concerned, accorded with his views in the matter.

From the beginning to the end these entrymen acted under Robnett's direction.

Besides the testimony of Robnett as to his combination with Kester and Kettenbach, and the facts and circumstances already related corroborative thereof as we pursue the scheme and conduct of the defendants step by step in their acquisition of timber land, other matters will be mentioned later in their proper connection in the chain that will further fortify Robnett's statement of the relations that existed between them, not only prior to and at the time of the making of the entries in the Robnett Group, but through the entire period covered by the acquisition of the Kester, Kettenbach, and Dwyer timber lands.

THE EMORY AND COLBY GROUP.

During the period the "Robnett group" of entries were making, what are known as the "Emory and Colby group" of entries were initiated. The entries that form this latter group are the Evans, Bishop, and Clute entries filed March 24, 1903; the Newman entry filed March 25, 1903; and the Dent and Smith entries filed April 2, 1903.

Robnett in reciting the transactions relative to the Emory and Colby groups stated that, in the spring or summer of 1903, Colby came out of W. F. Kettenbach's private office at the bank and addressing Kester at the latter's desk said that during the preceding winter Emory had cruised a number of timber claims in 39-3

and that spring had located six men, who were working for them in the timber upon said claims (pp. 2273-2275) and gave the names of Evans, Bishop, Clute, Smith, Dent of the entrymen, but he could not remember the names of the other entrymen (p. 2279); that they had arranged with said entrymen prior to making their applications to file (p. 2278); that they were to furnish said entrymen with the money and all the expenses to make proof and to pay them \$200 each for their right and they were to convey their claims to Emory and Colby; that they (Emory and Colby) had been unable to get the money, and said "if Mr. Kester and Kettenbach went in and took care of the entrymen under the same conditions and terms that they had with them, that they would deed the claims over to them after proof and they were to receive \$200 per claim" (pp. 2273-2274). Kester told Colby that he would take the matter up with Kettenbach. Later when Kettenbach came to the bank Kester related to him the story that Colby had told him and it was agreed between them that they would take the matter up with Dwyer and also have Emory come in the next day and tell what he knew about the claims (pp. 2276-2277). The next day Colby and Emory came to the bank and Kester told Colby that they would furnish the money for proof and take the claims under the same conditions that they had with the entrymen and pay each of the entrymen \$200 for his right (p. 2277). On the day the entrymen made proof Colby came to the bank and talked with Kester in Kettenbach's private office. Kester directed Robnett to bring to him \$2,400 in currency and to make a cash item for the money, which

he did (pp. 2277-2278). At that time Evans and another of the entrymen were standing just outside of the bank on the sidewalk (p. 2279).

From the testimony of Emory is taken the following:

In the spring of 1903 Joseph B. Clute, James C. Evans, Lon E. Bishop, Frederick W. Newman, Charles Dent, and Charles Smith made timber and stone entries in Twp. 39 N., R. 3 E., B. M. These six entries were known as the Emory & Colby entries. All of them but Dent had worked in the woods for about fifteen years for Emory, who was at that time engaged in locating people on timber (pp. 3116 to 3119). These entrymen were located by Emory, and prior to the time they made application to file Emory had instructed his bookkeeper, Colby, to make an effort to obtain the money for the entrymen with which to make proof (pp. 3082, 3092). Colby testified "and I think Mr. Emory spoke to me about money before they were located, saying they hadn't the funds to prove up with" (p. 3083). Colby saw Wm. F. Kettenbach at the bank and asked him to lend the money for the six entrymen to make proof. Kettenbach requested Colby to have Emory see him as to the value of the claims and the amount of timber on them, and Kettenbach asked Emory when he went to the bank to discuss the matter with Kettenbach whether a loan of \$400 on each of said claims was safe. Shortly after he left Kettenbach, Colby saw Kettenbach, who told him that he would advance the money for the six entrymen to make proof (pp. 3084, 3094 to 3496, 3119, 3128). Colby left the bank and advised Emory and the entrymen in waiting that Kettenbach would lend the money for

proof (p. 3084). Colby went to the bank and got the money and gave each entryman \$420.00 (p. 3093). With this money the entrymen went directly to the land office and made proof. While the entrymen were making proof Colby arranged with Lawyer Barnett, whose office was close by the Lewiston National Bank and the land office, to prepare the mortgages. He waited outside of Barnett's office for the entrymen to return. Colby said Emory and the entrymen joined him and that Emory informed him that the entrymen had decided to sell and not make mortgages. That afternoon four of them conveyed their claims to Kester and Kettenbach, and several days later the other two conveyed to Kester and Kettenbach, the latter two not having made their final proof until several days later than the others, each, however, conveying to Kester and Kettenbach their claims later on the day on which they made proof and receiving a small amount over and above what the claims cost (pp. 3085 to 3097, 3130). Colby settled with the entrymen in front of the bank, Emory being present (pp. 3101-3102). Emory was a witness at final proof for Dent, Newman, and Smith, and though he assisted in securing for them the entire amount of money with which they made proof, he swore at the land office a few moments later that of his personal knowledge they each had sufficient money of their own to pay for the land and to hold it six months without mortgaging it (pp. 3129 to 3138).

THE CLUTE AND EVANS ENTRIES.

Clute and Evans could not be found at the time of taking testimony in these causes. They both made

application to enter timber claims March 24, 1903. They made proof June 17, 1903, and on the same day each conveyed his claim to Kester and Kettenbach. The receipt of the receiver given each of them at the time they made proof, together with the deeds, were recorded at the request of Kester in August, 1903 (pp. 1425, 1426, 1633). At final proof Clute swore at the land office that the money with which he had purchased the land he had worked for and that he had had the same in his actual possession for two months (p. 3888), and Evans on the same occasion said that he earned some of the money with which he made proof by lumbering and that he borrowed the balance (p. 3913).

THE BISHOP ENTRY.

Lon E. Bishop entered a timber claim March 24, 1903. Emory located him, and nothing was said about a location fee (p. 2976). He and James Evans came to Lewiston together and Bishop filed. Emory directed him to go to Krutinger's office, where he had his filing papers prepared (p. 2978). Evans also accompanied him to Lewiston at the time of making proof. When Bishop started from home the morning he was to make proof he did not have the money with which to purchase the land, nor did he have an idea what the value of the timber was (p. 2979). Colby gave him between \$400.00 and \$450.00 with which to make proof. He left Colby and went immediately to the land office and made proof with the money Colby had given him (pp. 2981, 2983). Conveyed the claim the day he made proof to Kester and Kettenbach. Kester paid him the money at the Lewiston National Bank.

and he cleared about \$150.00 on the claim (pp. 2984-2985). He did not pay for the preparation of the deed, nor does he know who gave the one that drew the deed the description of the property (pp. 2987-2988). In answer to the question as to whether he expected to pay for the land with his own money and how long he had had the same in his actual possession, he swore at the land office that he earned all but \$150.00, and that he borrowed (p. 4062). Bishop made proof and purchased the claim June 17, 1903. On the same day he executed a deed to Kester and Kettenbach, which deed was in August, 1903, recorded at the request of Kester. Receiver's receipt recorded at the request of Kester at the same time (p. 2989).

THE NEWMAN ENTRY.

Frederick W. Newman made a timber and stone entry March 25, 1903 (p. 692). At that time he was employed at a warehouse owned by F. W. Kettenbach; salary, \$70 or \$75 a month (p. 672). Emory suggested that he take up a timber claim. Newman told him he would give him an answer in a few days, as he wanted to see the cashier of the Idaho Trust Company with a view of borrowing the money for that purpose from him. F. W. Kettenbach was at that time president of the Idaho Trust Company (pp. 674 to 677). Emory accompanied him to the lawyer's office when he had his papers prepared, and also went with him to the land office when he filed (pp. 681-682). He paid over \$400.00 in the land office when he made proof (p. 683). Colby gave him the money in the hallway at the land office. Emory told him that Colby

would bring him the money to the land office. Newman waited in the hallway at the land office until Colby came, and the latter asked him how much he wanted. Newman told him that he had ninety-odd dollars and didn't know how much would be required. Colby said, "I am in a hurry. Here it is" (p. 686). Colby said, "You pay what it costs you at the land office and if there is anything left hand it to Fred Emory." He then went into the land office with Emory and made proof (pp. 687-688). Bishop and Evans were at the land office at the same time. They all left the land office together, and Newman went to the Idaho Trust Bldg. to fire his furnace, where he was at that time employed as a janitor. Made proof in the afternoon and conveyed the title to the claim to Kester and Kettenbach the same afternoon. Emory paid him \$200.00 when he deeded the claim (pp. 689 to 691). He made \$20.00 out of the claim (p. 699). In his testimony at final proof Newman swore before the land office that the money with which he made proof was his own, and that he had earned part of it and borrowed part. Newman made proof June 17, 1903. The deed to Kester and Kettenbach bears the same date and it was recorded at the request of Kester August 10, 1903 (pp. 693-694).

THE DENT ENTRY.

Charles Dent made a timber filing April 2, 1903. He is sixty-three years of age, and has lived on the north fork of the Clearwater River for twenty-four years. Emory was locating people on timber in that vicinity, and asked Dent if he had ever taken up a claim. Dent

said "no," that he didn't know that he had much use for one, as he couldn't sell it. "Oh, yes, he said, I could sell a claim most any time," so I concluded I would take one. I told him if I could get \$100.00 for the claim I wouldn't mind taking one. "Well," he says, "you can easy enough get \$100.00" (pp. 716-719). Dent didn't have the money to purchase the claim when he had that conversation with Emory. Emory located him and nothing was said about a location fee and he never paid one (p. 719). "Q. Do you remember whether or not in that affidavit you made this statement: I talked to Mr. Emory before I made my entry. Mr. Emory came to my place and asked me what I would take for my right, I told him \$100.00, the amount I did receive? A. I told him I would take \$100.00, yes. Q. And you got \$100.00? A. Yes, I got \$100.00" (p. 722). When he came to Lewiston to file he met Fred Emory. Does not know what it cost to file or to make final proof on the claim (pp. 722-723). Emory advised him of the time to make proof. Did not arrange for the proof money before he left for Lewiston. Met Colby on the street and asked him to lend him some money, which the latter did. "Q. How much did you ask him to loan you? A. I think it was \$100.00" (pp. 726-727). Dent didn't care whether he made proof on the claim or not. "Q. Now, do you remember that you had \$400.00 which you paid at the land office when you made your proof? A. \$400.00? Q. Yes, sir. A. No, I didn't have \$400.00. Q. Well, you must have, or somebody had it, because you paid \$400.00 for the land in the land office. A. Well, of course, I must have had it if that is what it is." Colby

gave Dent the proof money on the street and then accompanied him to the land office (pp. 728-729). Emory and Charles Smith were at the land office at the time Dent made proof. Dent, Emory, and Smith left the land office together and met Colby, and Dent sold his claim through the latter and executed a deed for it within an hour after making proof. Colby gave him \$100.00 (pp. 729-730). "Q. Do you know that you made the deed to Kester and Kettenbach? A. I don't know, I didn't read the deed" (p. 730). Dent said "I talked to Mr. Emory when he was at my place of business where I could get the money and he told me he could let me have the money, so I didn't pay any more attention to it." The transaction turned out just as Dent understood that it would from the start. Dent had no recollection of spending any money of his own for the expenses of taking up this timber claim. He understood from the first talk he had with Emory he would get \$100.00 out of it and he wouldn't have taken it up if he hadn't been told that (p. 731). At final proof Dent testified that the money with which he purchased the land he had earned part of, and had borrowed the balance (p. 3834). Dent made proof June 23, 1903, and receiver's receipt was issued to him at the same time. On the same date he executed a deed to Kester and Kettenbach conveying title to his claim and the same was recorded at the request of Kester August 10, 1903 (p. 732).

THE SMITH ENTRY.

Charles Smith made a timberland filing April 2, 1903 (p. 2999). He was at that time employed by Fred

Emory, and when he was working in the woods he was paid \$40.00 a month (p. 2995). He and Joseph B. Clute asked Emory to locate them on a timber claim and they didn't have the money with which to purchase a claim, and they advised Emory to that effect and Emory said he would "back them up." This was before they filed on the claim. Smith and Clute were together when the conversation relative to locating on the claims was had with Emory, and Smith and Clute both came down to file at the same time (pp. 2995 to 2999). Smith received the money with which to make proof from Emory. Emory and Dent accompanied him to the land office when he made proof (pp. 3004-3005). His best recollection is that Emory gave him the \$412.00 that he paid into the land office when he made proof. Is not sure, however, and it might have been Colby. Smith and Clute talked over the matter of selling the claims together and they negotiated the sale through Emory the day they made proof and immediately afterwards (pp. 3007 to 3010). Smith and Clute went to an office together and had the deeds prepared (pp. 3010-3011). Smith got \$600.00 for the claim, and after he returned the money that had been advanced to him he had very little left (pp. 3013 to 3015). At final proof Smith testified that the money with which he paid for the land he had earned most of and had borrowed \$200.00 (p. 4065). Smith made proof June 23, 1903 (p. 2999). Receiver's receipt and the deed conveying title to his claim to Kester and Kettenbach are dated the same day and recorded at the request of Kester August 10, 1903 (pp. 1510-1511).

SUMMARY OF EVIDENCE CONCERNING EMORY AND COLBY
GROUP.

Notwithstanding the fact that the six entrymen conveyed their claim to Kester and Kettenbach on the same day on which they made proof, and none of whom received as much as \$200.00 above what his claim had cost, in making proof, several hours before, Bishop swore that his claim was worth \$1,000 (p. 4061); Clute swore that his was worth \$1,500 (p. 3887); Dent testified that his was worth \$2,000 (p. 3834); Evans stated that his claim was worth \$1,200 (p. 2913); Newman swore that his was worth \$1,000; and Smith swore that his was worth between \$2,000 and \$2,500 (p. 4064).

Though Robnett's recital of the conversations and arrangements that took place in the Lewiston National Bank between Colby and Kester relative to this group of entries, showing that the entries were made pursuant to an agreement between the entrymen and Emory, the entrymen to be furnished the money with which to take up and purchase the claims and to pay the stipulated price for them after proof, and that this arrangement was detailed to Kester and he had agreed to take over and complete the agreement on the same terms, is denied by those stated to have had the conversations; Robnett's testimony is corroborated in part by the testimony of Kester, Kettenbach, Emory, and Colby, witnesses for the defense, and the portions of his testimony that are contradicted by said persons are strongly supported by the contemporaneous facts and circumstances, and a reading of the testimony of the entrymen—Bishop (beginning p. 2976 of record), Newman (p. 671 of record), Dent (p. 716 of record), and

Smith (p. 2995 of record), seems to us to be conclusive that all of the entries of this group were made pursuant to an antecedent agreement with Emory that the entrymen, in consideration of his furnishing them the money with which to enter and perfect their entries, would after proof convey the same as Emory directed for an amount certain.

Dent's testimony is especially significant in this respect. He was sought out by Emory and solicited to make an entry, Emory telling him he could make \$100.00. He paid no location fee, and the money was furnished him with which to purchase the land, but he does not remember the amount, and he conveyed to Kester and Kettenbach within an hour after making proof and received the promised \$100.00.

A great part of the conversation related by Robnett is also told by Colby in his testimony, but Colby, Kester, and Kettenbach deny that a prior agreement with the entrymen was spoken of; Colby also testifies, as does Kettenbach, that the conversations were had with Kettenbach and not with Kester. This is merely another form of an attempted impeachment of Robnett in like character to that where the testimony of Robnett and the evidence of Lambdin point to the conclusion that Kester tried to induce Hutchings to make an entry for their benefit, and Kettenbach testifies that it was he who had the conversation with Hutchings.

So fearful was counsel for the defense that Colby in his testimony might have corroborated Robnett in this regard counsel invited the following colloquy:

Mr. TANNAHILL:

Q. I will ask you, Mr. Colby, if at this first conversation which took place between you—well, I will ask you who you first talked to about these transactions? I understood you to say Mr. Kester. Is that right?

A. You mean who of the defendants?

Q. Yes.

A. Mr. Kettenbach. Did I say Kester? I never talked with Kester about it at all (pp. 3086–3087).

And again in the testimony of Mr. Emory, who testified on behalf of the defense in referring to his inability to get the money for the entrymen to make proof from a Mr. Skinner, said:

* * * And so I told him to see other parties, and he told me he would, and one day he said he was talking with Mr. Kester, I think, in regard to it——

Q. Mr. Kester, or Mr. Kettenbach?

A. I wouldn't be sure whether it was Kester and Kettenbach or Mr. Kettenbach * * * (p. 3119).

Before the entrymen had applied to make their filing Emory evidently knew that the entrymen did not have the money with which to purchase the land and had agreed to furnish it for them, as Mr. Colby, testifying said:

* * * Mr. Emory had been engaged in locating parties on timber, had made a business of it, and finally located them on timber, *and I think Mr. Emory spoke to me about money matters before they were located, saying that they hadn't the funds to prove up with, and asked me*

my opinion as to whether there would be any trouble in getting a loan to prove up with, and I told him I thought not, if they got good claims (p. 3083).

Robnett testified that on the day the entrymen made proof Colby came to the bank and talked with Kester in Kettenbach's private office, and that Kester directed him (Robnett) to bring to him \$2,400.00 in currency and to make a cash item for the money, which he did (p. 2278).

If Robnett did not hear the conversation he related and did not take out of the cash of the bank the amount of money he states at the direction of Kester and give it to him and put in the place thereof a cash item, the money that was used for this purpose on that occasion would have been charged in the regular way to the account of Kettenbach in the ledger of the bank.

Colby testified as follows:

Q. And how much money did you get from Mr. Kettenbach for these gentlemen to make their proof?

A. I think I handed them \$420.00.

Q. Apiece?

A. Yes, sir.

Q. How much money did you get from Mr. Kettenbach?

A. I got all of it from him.

Q. Twenty-five hundred and some odd dollars, wasn't it?

A. I don't know; there was six of them.

Q. Well, six times four hundred and twenty is 2520. Is that the amount you got from Mr. Kettenbach?

A. Yes, sir; I guess it must be. I didn't get it all at once, though. Mr. Robnett there seems to have stated that he brought in \$2,500.00. It didn't all come in at once (p. 3093).

As to this matter Mr. Kettenbach testified:

I know that Mr. Colby got the money, and, I am not certain, but I think, I just told him to draw his check for just the amount that he would need, and to attend to the whole matter. I know I was busy with something else, and I had perfect confidence in Mr. Colby, I had known him for a long time, and I think I told him to attend to the whole matter, and attend to drawing up the mortgages and notes and everything, and to deliver them to me properly perfected (p. 3438).

At the date of the making of the final proof of these entries Colby had no account at the Lewiston National Bank (pp. 3685-3686), and if he had given a check in that amount it would necessarily have been taken care of as a cash item by Kester and Kettenbach, as were the O'Keefe checks, the Dwyer checks, and the Steffey checks, to be mentioned hereafter, and it was not a bank transaction, as, according to Kettenbach, mortgages were to be taken.

Thus, four of five of these entrymen were in the employ of Emory and Colby and were working at that time on the township upon which they entered; Dent was not employed by this firm regularly, but was sought by Emory and was not charged a location fee. None of them had the money with which to purchase the claim, and this was known to Emory and that intelligence conveyed to Colby before the entries were initiated.

Kettenbach, either for himself, or himself and Kester, furnished the money for the purchase of these claims, and the six claims were deeded to them the day proofs were made, within a few minutes or several hours thereafter. In no part of the transaction did the entrymen act independently, but were moved from place to place by Emory and Colby and did as they directed. Emory had been to the bank for the purpose of securing the money for the entrymen, and if the testimony of Kettenbach and Colby to the effect that they were to give notes and mortgages to secure the money furnished is to be credited, Emory knew it. Notwithstanding that fact, within a few minutes after the money was gotten from Kettenbach or Kester and delivered to the entrymen Emory accompanied the entrymen to the land office (which was in the Lewiston National Bank Building on the floor above the bank) (p.3005), appeared as a witness for three of said entrymen, and testified that they had sufficient money of their own to pay for this land and to hold it for six months without mortgaging it (pp. 3129-3138). Emory immediately after proof accosted Colby and stated that the entrymen desired to sell the claims.

THE CORNELL ENTRY.

The next entry made was that of Ivan R. Cornell, in which the initial papers were filed June 19, 1903. This entry was procured by Kester under a positive prior agreement that Cornell would make the entry, Kester to furnish all the necessary money for the purpose and Cornell to convey the title to his claim to Kester for \$100.00. The facts surrounding this claim are signifi-

cant as showing that Kester, Kettenbach, and Dwyer were still pursuing the same methods in procuring entrymen, to make entries under antecedent agreements, as they had with the first one they had procured, the Lambdin claim, in April, 1902, fourteen months prior thereto; Kester, Kettenbach, and Dwyer each performed an important function in the procuring and perfecting of this entry and of obtaining the title to the same. They also show the perfect understanding that Kester, Kettenbach, and Dwyer had among themselves in their concerted endeavor, and are further corroborative of Robnett's statements of their timber transactions and of the character and financial standing of the persons they were using as their tools.

As a boy years before, Cornell had gone to school with Kester at Portland. At the time of making his entry he was practically an indigent about the streets of Lewiston, and had no regular employment. Kester stopped him on the streets of Lewiston one day, and in the conversation which followed, Cornell told Kester that he was out of work, and asked him if he could secure him some employment. Several days later, Kester again met Cornell and told him that he was unable to find him any employment. Cornell stated that he was short of funds, and Kester "made him some little advance." Later Cornell went to the bank and Kester loaned him \$10.00 (pp. 3161-3162).

Dwyer testified Cornell was engaged in picking cherries for White Brothers (p. 3401).

Kettenbach testified that Cornell worked in his yard cutting grass, and also had worked in the yard of Frank Kettenbach, who lived next door (p. 3500).

Prior to filing, Cornell had been employed by both the register and the receiver of the land office splitting wood for them (p. 2817).

This is the man whom Kester followed to his lodging and induced to agree to enter a timber claim upon the conditions before stated, and the claim that Cornell entered was Dwyer's homestead (p. 3330).

The testimony of Cornell to the effect that after Kester and Dwyer had coached him as to how he should answer the questions to be propounded to him at the land office from a list of questions they had in their possession, the answers to which were written in lead pencil, which list, after that important function was performed, was given by Kester to Robnett, strengthens and corroborates the testimony of Robnett as to the confidential relations that existed between him and Kester and Kettenbach, and especially of their relations concerning timber matter.

Cornell's testimony is to the effect that every dollar he used in the transaction was furnished him either by Dwyer or Kester, even the twenty-five cents necessary for notarial fee incident to some step taken in the filing of the claim, and his testimony is entirely consistent on this point, as from his financial condition, which was known to Kester, Kettenbach, and Dwyer, he had nowhere else to get it.

Ivan R. Cornell, who made a timberland entry June 19, 1903, testified that he had known Kester a number of years, having gone to school with him as a boy at Portland. At the time he took up his timber claim was residing at Lewiston. He had no regular employment, but was doing odd jobs. One afternoon in June, 1903,

Kester followed him to his room and asked him if he had ever used his stone and timber right. Cornell replied in the negative (pp. 2801-2802). Kester told him he knew of a place where he could use his right and told him if he would file on the claim he had in mind he would pay all the expenses of going to look at the land and all the expenses in connection with the filing and furnish the purchase price at final proof. Cornell to deed the claim to him after he got title and Kester would pay him one hundred dollars. Kester told him that that would be stretching the law. Kester asked him if he would agree to take up the land under those conditions. Witness replied "I guess so." Kester told him to meet Dwyer at the railway station the next morning (pp. 2802-2803). Cornell did not even know where they were going, but met Dwyer at the ticket office where the latter bought two tickets. He had never talked to Dwyer about a timber claim and did not advise Dwyer what he was there for. The claim that he was shown by Dwyer, Dwyer stated was a homestead claim that was to be relinquished. Thinks Dwyer told him it was his own homestead. (Dwyer says it was his homestead. In going to the timber Dwyer remarked that the timber they passed through belonged to parties who were associated with him (pp. 2803 to 2812). Cornell did not pay any of the expenses of the excursion to the timber. The conversation with Kester was before he had even viewed the timber. The day after his return from the timber Cornell went to the Lewiston National Bank to meet Dwyer, having made an appointment with him for that time and place to receive the relinquishment. When Dwyer arrive Kester was at

luncheon. Shortly thereafter Kester and Kettenbach returned to the bank from luncheon and Kester, Kettenbach, and Dwyer went into Kettenbach's private office in the bank (pp. 2806-2807). After the conference between Kester, Kettenbach, and Dwyer, Dwyer came out of Kettenbach's office with the relinquishment for the homestead in his hand. He stated to Cornell that he was ready to go upstairs to the land office. At the time Dwyer gave Cornell \$8.00 for filing fees. Dwyer took him upstairs to the office of a lawyer by the name of Mullen to prepare the filing papers (p. 2809). Cornell did not know the names of witnesses that were necessary for final proof and Dwyer suggested Wm. F. Kettenbach and two others (p. 2811). Later Kester gave Cornell \$1.50 to pay Mullen for preparing the papers (p. 2812). Shortly thereafter Kester gave him \$0.25 and a blank paper to take to a notary public and have acknowledged. Thinks it was a second relinquishment. After the notary put his seal on it he returned to the bank with it and gave it to Kester. Kester asked him to sign it and have Robnett and Bradbury, a clerk in the bank, witness his signature. About a week before final proof Kester met him on the street and advised him of the time that proof was to be made (pp. 2815-2816). Before final proof Cornell discussed with Kester the answers he should make at the land office relative to where he had received the money to purchase the land. Prior to filing Cornell had worked for the register and receiver, splitting wood for them. Kester told him to come in the morning he was to make proof and he would go over the questions with him. In compliance with this agreement he went to

the bank and met Dwyer, who advised him that Kester was waiting to see him and he had better go in and talk with him. Kester had a set of final proof papers with the answers to the questions written in lead pencil; handed them to Dwyer and Dwyer and Cornell went into Kettenbach's private office (pp. 2817-2818). Kettenbach was in his office at that time. While they were going over these questions some person called to see Kettenbach and the latter suggested that Dwyer take Cornell into the directors' room. After going over the questions with Dwyer they went into the banking part of the building and Cornell gave the questions to Kester, telling him he was through with them, and Kester handed them to Robnett. Kester then figured up the amount of money it would cost to pay for the land and handed Cornell \$360.00 (his claim was for 138 acres) (pp. 2818-2819). Dwyer and Cornell returned to the directors' room, and then went upstairs to the land office. The money Kester had given him was to pay for the land. Shortly after they went to the land office Cornell went back into the bank and told Kettenbach that the receiver would be ready for him to testify in regard to Cornell's claim in about twenty minutes. At the taking of proof the receiver in observing the answer that Cornell had made that he was getting the money from his father remarked that it looked to a man up a tree like Dwyer had—or that he was going to deed the land back to Dwyer after making final proof, and Cornell told him "no." (pp. 2820-2821). Immediately upon leaving the land office and he had gotten to the street Dwyer stated that he had a deed for Cornell to convey the land to Kester and Kettenbach and asked

him to take it over to Otto Kettenbach and to acknowledge the deed before him (p. 2822). This was within ten minutes after he made proof. Cornell told him that before he executed the deed he wanted to see Kester. That evening Kester met him and asked him if he had executed a deed and said that he had better do it. Cornell repeated to Kester the remarks made by the register about there being a man around for the purpose of investigating that and other claims. Kester replied that that man was looking into timber trespass cases and that as to investigating violations of the timber laws, nothing of that kind would happen in Idaho (pp. 2822-2823), and if any such thing should occur that he, Kester, would be the man they would get after, and further remarked "You, Dwyer, and I are the only persons that know anything in regard to this agreement," and "if we all deny it how can any trouble come to us?" Kester asked him to come into the bank the next day. He wanted to change the date of the deed. Cornell again went to the bank and went into Kettenbach's private office with Kettenbach and there he changed the date of the deed (p. 2823). Kettenbach stated that he didn't intend to have the deed recorded for six months and that he would want another one later on and stated that he had already made arrangements to transfer the title (p. 2824). Kester also said that when that time came he would ask him to make another deed, which he did later and returned it to him. Acknowledged the deed before Otto Kettenbach. The second deed was made to Wm. F. Kettenbach and Geo. H. Kester. A day or two later Kester told him to come into the bank and he would pay him the money (pp. 2825-2826). The

next day he went to the bank and Kester paid him the money. The money was paid six or seven days after proof. Kester having loaned Cornell small sums of money, when the settlement was made, gave him \$85 or \$86. Part of it was paid in cash and for the balance he gave Cornell a certificate of deposit. The certificate was for \$55. Kester told the teller to give him the certificate of deposit (pp. 2826-2827). Thinks he made a second deed to Kester and Kettenbach September 29. When the second deed was made Kester returned the original deed to Cornell which he burned. In the summer of 1905 Cornell met Kester in the Imperial Hotel, Portland, Oreg. While in the hotel Kester came in and began talking to him about grand jury proceedings at Boise at which Cornell had testified in the previous July. Kester told him that he, Cornell, would have nothing to fear and that he would see him again. When Kester first talked with him about taking up a claim it was Cornell's understanding that he was to look at a claim with Dwyer, make application and after getting title from the Government to deed it to Kester and get \$100 (pp. 2827 to 2830). Exhibits offered on page 2831. Robnett testified that in the spring of 1903 Kester came into Kettenbach's office and stated that he had met an old schoolmate of his from Portland, that he had gone to school with him at Bishop Scott's Academy, that he seemed to be in hard straits and that he had spoken to him about taking up a timber claim and said "I spoke to him about taking up a timber claim and that we would give him \$100. He needs the money bad and think he is going to take the offer, and I think we can put him on the claim that Bill Dwyer is

holding as a homestead." Kettenbach asked Kester if he could depend upon Cornell (p. 2229). Kester replied—"Yes, I believe he will come through and sell his right for \$100." Kettenbach told Kester to see Dwyer about taking him to the land and that if everything was all right for him to go ahead. Robnett tells of a number of conversations had between Kester and Cornell at the bank (p. 2230). Cornell made proof September 10, 1903, and the deed conveying the claim to Kester and Kettenbach is dated September 29, 1903 (p. 2831).

THE HAEVERNICK ENTRIES.

The next two claims are those of Wm. Haevernicks and wife, entered in October, 1903, both of whom were in a company, together with Frank Kettenbach and two others, of which Frank Kettenbach was president, and whose claims were conveyed to Frank Kettenbach in some sort of a settlement that they had with him in the company. The testimony relative to them is reported on pp. 470 to 490 of the record.

The next entries in the suits were made April 25, 1904, when several additional townships were thrown open to entry to the public. It is in these townships that Kester, Kettenbach, and Dwyer gave full rein to their rapacious greed in the acquisition of Government timber lands. From the dates of the entries it would appear that for the period of ten months between the entry of the Cornell claim and those initiated April 25, 1904, the combination had remained inactive, while, in fact, their operations were more continuous, bold, and fruitful than any during their concert of action.

There was to be an opening of several new townships, well timbered, in the near future, no definite date for the opening being fixed, that time depending upon the date of the filing of the surveys by the Government, and, as provided by statute, the land to be opened to the public for entry sixty days after the filing of the plats of survey. Under such circumstances it was the habit of persons to squat upon quarter sections, pretending to select the same for a homestead, and in the event the State did not, in the exercise of its preference right of selection (which was sixty days after the plats of survey were filed), select these homesteads the persons who had located upon the unsurveyed land within said townships would be entitled to make a homestead filing upon the same, or, after having made such filing, change the same to a timber and stone filing, thus giving said squatter the advantage to make a timber and stone filing over all others.

On February 24, 1904, the plats of survey of twps. 39 N., Rs. 5 E. and 6 E., and 38 N., Rs. 5 E. and 6 E., and 40 N., R. 5 E., B. M., were filed in the land office at Lewiston, and these lands became subject to entry, according to law, April 24, 1904 (pp. 1551, 1552, 1553, 1556). These are the lands that were the object of the combination's special design.

Robnett testified that in May, 1902 (should be 1903), Kester told him that Dominick Cameron, a timber cruiser, had cruised out and surveyed about eighteen claims in one of said townships and that Kettenbach was going to take a couple of said claims and had his cousin Solomon Caldwell and one Low squatting

thereon, and suggested that he and Robnett also locate several of said claims and file on them when the same became open to entry; later the matter was thoroughly discussed between Kester, Kettenbach, and Robnett in the directors' room of the bank and it was arranged that Kester and Robnett should have cabins built on several of the claims and put one McGee upon the claims to hold them for them. Kester stated that they should build cabins before the surveyors came along and that he had it arranged with the man in charge that he would make a notation on the maps which would indicate their claims at the land office. If the State did not select the claims upon which they were to put squatters, they proposed to get some one to file homesteads upon them after the land became open to entry and later to relinquish said homesteads and file on the claims under the timber-land act. Later Kester, Robnett, and McGee went into the Pierce City country, each selected a claim and McGee was to build a cabin and hold the claims for them. For holding the land until the plats were filed McGee was to be paid \$100 and all his expenses (pp. 2211 to 2216).

At pages 3180 to 3186 portions of Robnett's testimony were read to Kester and he was asked whether or not such conversation was had, to which he answered no. He does not, however, deny that he, Robnett, and McGee went into the timber beyond Pierce City, or the arrangements which Robnett states was made with McGee; that the persons whom Robnett says were there were in fact there and corroborates Robnett's testimony in part as follows:

Answer by Kester:

Well, I think there was something about the McGee proposition; that is, I wanted to get one claim up there, and as I remember it the claim that Clarence wanted was near that one, and that McGee was to build a cabin, and do some improvements there, in the meantime—to make the required improvements for a squatter's claim; and that is all I remember about it (p. 3182).

Kettenbach does not deny the part of Robnett's statement to the effect, that he, Kettenbach, had a couple of persons holding claims for him in the Pierce country (p. 3455).

So in the spring of 1903, Kester and Kettenbach were making ready for the opening of the townships above mentioned, and in the fall, in October of that year, they made further preparation by having Dwyer take into those townships nineteen entrymen who later form the line up at the land office the day of the opening (April 25, 1904), composed of George H. Kester and his relatives; the kinsfolk of Wm. F. Kettenbach, the entrymen who were procured to make entries by Kester and Kettenbach and also the entrymen procured by O'Keefe, Kester's partner, and Dwyer. Also in said township are about sixteen entries that Dwyer contested, and these claims were acquired by Kester and Kettenbach through relatives of Kester, and entrymen procured by Dwyer to file upon them.

THE "LINE UP" AT THE LAND OFFICE.

As heretofore stated, said townships were not open to entry by the public until April 25, 1904 (pp. 1522,

1553-1556, 1551) and a week or ten days prior to that day persons began to form in line at the door of the land office at Lewiston to await the day on which they could file on said claims, and on the morning of April 25, 1904, there were in line at the land office the following-named persons in the order in which they appear below:

1. Jackson O'Keefe (partner of Kester).
2. Charles W. Taylor (nephew of O'Keefe).
3. Joseph H. Prentice (employed by Kester and O'Keefe).
4. Edgar J. Taylor (nephew of O'Keefe).
5. Edgar H. Dammarell (brother-in-law of Prentice).
6. George H. Kester (defendant).
9. Guy L. Wilson (son-in-law of Mrs. Justice).
10. Edna P. Kester (wife of Kester).
11. Frances A. Justice (mother-in-law of Wilson).
12. Fred E. Justice (son of Mrs. Justice).
13. Elizabeth Kettenbach (aunt of Kettenbach).
14. Elizabeth White (mother-in-law of Kettenbach).
15. Wm. J. White (brother-in-law of Kettenbach).
16. Mamie P. White (sister-in-law of Kettenbach).
17. Martha E. Hallett (housekeeper for Kester).
18. Daniel W. Greenberg.
19. David S. Bingham (employed by Kester and O'Keefe).
24. Hattie Rowlan.
25. Wm. McMillan.

Each of the above-named persons were induced to make an entry either by the defendants Kester, Kettenbach, and Dwyer personally, or by one of their agents; and said entrymen made their entries in accordance

with a prior agreement or understanding that they would convey the title acquired to the defendants or as they should direct; and the entrymen did convey the claims so entered to Kester and Kettenbach or to Kittie E. Dwyer, except Martha E. Hallett and the kinsfolk of Kester and Kettenbach who still hold the titles to the entries made by them for the benefit of said defendants.

We will refer to the evidence concerning the nineteen entries forming the line-up; and the contests, *seriatim* and in sequence.

THE O'KEEFE GROUP.

The entrymen forming the O'Keefe group are Jackson O'Keefe, Charles W. Taylor, Joseph H. Prentice, Edgar J. Taylor, Edgar H. Dammarell and David S. Bingham. They each made an entry April 25, 1904, and held places in the line Nos. 1, 2, 3, 4, 5, and 19, respectively.

Robnett testified in regard to the entries of J. O'Keefe, David S. Bingham, Charles W. Taylor, Edgar J. Taylor, Joseph H. Prentice and Edgar H. Dammarell, which were spoken of as the "O'Keefe entries" that he knew Jackson O'Keefe in his lifetime and was present at a number of conversations that took place at the Lewiston National Bank between Kester and O'Keefe, and Kester, Kettenbach, and O'Keefe (pp. 2235-2236); that in the fall of 1903 or the spring of 1904 he heard a conversation between Kester, Kettenbach, and O'Keefe in the bank in which these entrymen were named as being some that O'Keefe could secure to file on timber claims at from \$150.00 to \$200.00 each; that O'Keefe was then authorized by Kester and Kettenbach to pay

all the expenses of said persons in connection with the claims by drawing checks on the bank and keeping a memorandum of it (pp. 2239-2240); that there were several different conversations between said parties in regard to these claims which were always mentioned as the "O'Keefe claims" (p. 2241); that prior to the time final proof was made on said claims O'Keefe was in the Lewiston National Bank and was told by Kester that when the claims were ready for proof that O'Keefe should come over to the bank and get the money and give it to the entrymen, then take them up to the land office and afterwards look after the transfer of the titles; that O'Keefe did get the money at the bank for the entrymen to make proof and gave checks for the amount, which were held in the bank as cash items and then taken up by Kester and Kettenbach; that Kester and O'Keefe were interested in an irrigation project at Cloverland, Wash., being joint owners of the same (p. 2242); that at different times the six claims were deeded to Kester and Kettenbach and were paid for by them (p. 2243), that Robnett was a bookkeeper in the Lewiston National Bank at that time and he worked on the depositors' ledger; he also worked at the window adding up the cash items, etc., and had charge of the different books in which these different accounts were run, "So I knew how the transactions was entered there and also the Asotin Land & Irrigation Company, there was some of these items went there, and afterwards they were taken up and settled by credits in disposing of it" (p. 2244) and finally all cash items of O'Keefe were taken up by Kester and Kettenbach (p. 2244); that at the time of the line up at the land

office April 25, 1904, the defendants had about 18 entrymen in line in which the O'Keefe claims were included (p. 2253); that the location fees of the O'Keefe entrymen were paid with a new \$100 bill which was the property of the Lewiston National Bank, being handed about from one entryman to the other and returned to the bank in the evening (p. 2280).

THE CHARLES W. TAYLOR ENTRY.

Charles W. Taylor, who was in the line-up and made an entry April 25, 1904, testified that he has resided at Asotin, Washington, for fifteen years. He is a nephew of Jackson O'Keefe and brother of Edgar J. Taylor. O'Keefe and Kester were in partnership in the irrigation business in the fall of 1903 and the spring of 1904 (pp. 1058-1059). Jackson O'Keefe spoke to Taylor about taking up this claim in the fall before he filed. He, O'Keefe, said he was going to take one and wanted Taylor to go with him and enter one, too (p. 1060). O'Keefe asked him to talk to his brother, Edgar J. Taylor, and Joseph H. Prentice and Edward Dammarell with a view of inducing them to take up claims also. The proposition of O'Keefe was that he would furnish the expenses for the entrymen and the money with which to purchase the claims. Taylor at that time was working for O'Keefe and Kester. That was the first conversation that Taylor had with O'Keefe about timber claims. O'Keefe was to furnish the money to take up the claim and then was to give Taylor \$150.00 over and above all expenses for the claim (pp. 1061-1062). O'Keefe told Taylor to tell Prentice and Dammarell and his brother that he would make the same

agreement with them. Taylor said he saw them and repeated what O'Keefe had said. When they started for the timber O'Keefe told Taylor that George Kester and some more of them were taking up claims (p. 1062); that George Kester was going in there with a crowd to take up claims. Taylor agreed with O'Keefe to take a timber claim up in compliance with said arrangements. The agreement was made two or three weeks before they started to view the timber. Those who went with Taylor to the timber were O'Keefe, Edgar J. Taylor, Prentice, and Dammarell (p. 1063). Taylor went to Lewiston and met O'Keefe at the depot and from there they went to Orofino. O'Keefe paid the expenses of the trip. From Orofino two of the party went on horseback and the rest in a hack to Pierce City, about 30 miles, and then 7 or 8 miles beyond Pierce (p. 1064). They were away from Lewiston two or three days, and Taylor paid no expenses whatever on the trip. He then returned to Asotin and did not file for several months (p. 1065). Wm. Dwyer went over the claim with him. He had no arrangements with Dwyer about paying a location fee. O'Keefe advised Taylor when to go to Lewiston and make his filing. Taylor stood in line at the land office for almost a week before he filed (p. 1066). O'Keefe brought him his sworn statement and other papers while he was in line waiting to get into the land office. O'Keefe also gave him the money to pay the filing fee at the land office (p. 1067). When Taylor went to Lewiston to make final proof two months later the same persons came with him that had been with him all the time—Prentice, Dammarell, and his brother. He saw O'Keefe on that occasion

and paid \$400 into the land office at that time, which Mr. O'Keefe gave him. Taylor had not asked him for the money (p. 1068). "Q. Now, did I ask you what you were to do with this land, in your first conversation with Mr. O'Keefe, what you were to do with this land to make that \$150.00?—A. I was to sell it to him." Later O'Keefe told Taylor he couldn't do what he had agreed to do. He said that he and Mr. Kester were taking up this land, and that Taylor was to convey to him to get the \$150 (p. 1069). Taylor was to sell the claim to him after he got the patent for it. That arrangement was made before Taylor went to see the land, but O'Keefe changed that and said he couldn't do that (p. 1070), and that said George Kester had advised him that it couldn't be done that way, but he went right on and took up the timber and intended to convey it to him just the same. "He thinks O'Keefe said that George told him he couldn't make no agreement of that kind or something to that effect" (pp. 1070–1071). At final proof Taylor testified that the money with which he purchased the land he had earned part and borrowed the balance and had had the same in his possession two weeks (p. 1072). This answer was not true, and O'Keefe told him to answer the question that way. He got a receipt from the land office the day he proved up, and either the next day or the second day after he turned it over to O'Keefe. Afterwards, when Inspectors O'Kallon and Goodwin came around, O'Keefe returned it to Taylor and told him to keep it until that thing was settled. He said it would look as though Taylor still owned the claim. Taylor had already conveyed the claim. O'Keefe told him to tell the inspec-

tors that he had his receipt, and the claim was his (pp. 1072-1073). At the time Taylor made the deed O'Keefe said he wouldn't record it until the patent was issued. Taylor made the deed two days after he made proof and got the \$150 at that time (p. 1074). The deed was drawn and signed at Asotin. Taylor said he just went down there and made the deed and O'Keefe gave him \$150.00. There wasn't any dickering about the price or anything of that kind. O'Keefe told them either on the road to the timber or when they returned from the timber that they would have to pay \$100 location fee. Taylor paid the location fee to Wm. Dwyer the day he made proof. He got the money from O'Keefe for that purpose (p. 1075). O'Keefe handed him \$100 and told him to pay that to the locator. It was a new \$100 bill, and he gave that to Dwyer (p. 1076). He proceeded in the matter of taking up this claim and disposing of it according to the understanding and agreement he had with O'Keefe the first time he talked with him about the claim and after the second statement made by O'Keefe that he couldn't make an agreement there was nothing more said about it (p. 1078). The first conversation Taylor had with O'Keefe, he said that he and Kester were going into the timber and take timber (p. 1081). O'Keefe said that he and Kester were in together; that they were going into the timber and take up claims (pp. 1084-1085); and that he and the party were going in to take up claims for him (O'Keefe) and Kester. He understood O'Keefe was to get his claim and was to turn them all over to Kester himself. Taylor made the same proposition to his brother, to Dammarell, and to Prentice,

and they agreed to take up a claim under this same condition as he did (p. 1085). Taylor made proof on said claim July 11, 1904 (p. 1059), and conveyed the title to same to Kester and Kettenbach by deed dated July 12, 1904. Said deed was recorded at the request of the Lewiston National Bank January 20, 1906 (p. 1087).

THE PRENTICE ENTRY.

Joseph H. Prentice, who resided at Cloverland, Wash., took up a timber claim April 25, 1904. He testified that he was acquainted with Charles W. Taylor, Jackson O'Keefe, Kester, and Dwyer; that he was solicited to take up a timber claim by Charles W. Taylor, who was living in Asotin, fifteen miles from where Prentice lived; that Taylor went to Prentice's home and asked him if he wanted to make some money. Prentice told him he did if he could do it honestly. Taylor then spoke about taking up a timber claim. Prentice said he had no money to make the entry or make proof, and Taylor said, "Uncle Jack will loan you the money," speaking of O'Keefe. Prentice asked him if he was sure and he said, "Yes, that he was getting money from him and Ed was getting money from him and that O'Keefe told him he would loan it to you." By Ed he meant Edgar J. Taylor (pp. 1225-1226). He told Prentice at that time that it would take about \$550 to perfect the entry. He didn't say what Prentice was to get out of it, but O'Keefe did. Some days later he called upon O'Keefe at Cloverland and told him of the conversation with Taylor. O'Keefe said, "Yes, that is right. I will loan you the money and take your note for every-

thing" (p.1227), "your straight note for a year for the filing money and the proving-up money and the current expenses going up to see the timber and also to pay the locator." Prentice asked if he thought he could ever sell it, and O'Keefe said, "Yes, you can sell it. In case you get tired of the deal, I will give you \$150 over and above all expenses." That was before he went to see the land or filed application to enter. He went to view the land the following October with O'Keefe, Charley Taylor, Ed Taylor, and Ed Dammarell. Dammarell is a brother-in-law of Prentice. In the first conversation Prentice had with O'Keefe he asked what would happen if he couldn't pay the note when it was due. O'Keefe said he would take up the note and that Prentice was sure of \$150 at any rate. O'Keefe notified him when to go to view the timber (p. 1228). He gave Prentice a railroad ticket at Lewiston and furnished horses and paid for some meals on the way to the timber. Mr. Dwyer located him on the claim (p. 1228). After viewing the land with this party he returned to Cloverland. Either O'Keefe or Charley Taylor notified him when he was to file and O'Keefe paid his expenses. He gave him about \$20 either at Asotin or Lewiston for that purpose (p. 1230). He was at Lewiston nearly a week before he filed (p. 1231). He knew he could get \$150, but he said he never promised that he would sell it for that (p. 1233). Prentice was not regularly employed and did not have the money with which to take up a timber claim. He was married at the time and his family consisted of wife and two children. I. N. Smith prepared the sworn statement for him. O'Keefe

told him to go there and his papers would be prepared. He didn't pay anything for making out sworn statement. O'Keefe gave him the money to pay the filing fee in addition to the \$20 before mentioned (pp. 1233-1234). It was at Lewiston he got the money. The whole thing, you see, went in, it was counted \$50.00 for expenses for the whole transaction (p. 1236). He paid about \$400 at the land office when he made final proof with money he had gotten from O'Keefe at Lewiston the same day that he made proof; O'Keefe gave him the money in the corridor of the land office and he used that money to purchase the land (p. 1237). O'Keefe took the receiver's receipt. On the same day O'Keefe also gave him money for his location fee and told him to give it to Dwyer. It was a new \$100 bill and he gave it to Dwyer. He got \$150.00 out of the claim from O'Keefe shortly after he had proved up (pp. 1238-1239). O'Keefe said no contract or agreement could be made to sell it. Before making final proof at the land office O'Keefe told him he was to say that he had borrowed the money from a friend (p. 1244). Prentice made proof July 11, 1904, and executed a deed dated July 25, 1904, conveying the claim to O'Keefe (pp. 1245-1246). O'Keefe conveyed the claim by quit-claim deed to Kester and Kettenbach July 30, 1904. Neither deed was recorded, however, until January, 1906 (p. 1715).

THE EDGAR J. TAYLOR ENTRY.

Edgar J. Taylor, a brother of Charles W. Taylor, entered a timber claim April 25, 1904. His brother, Charles W. Taylor, spoke to him about taking up a tim-

ber claim (pp. 1110-1111). He said if they would take a timber claim they could get the money with which to enter it and get the money to pay for the claim and sell it for \$150 above cost as soon as they got title. They were to get the money for all expenses and the \$150 from O'Keefe, the \$150 to be paid them after they had made final proof; that is, they could sell it to him at that price if they wanted to (pp. 1111-1112). On the trip to the timber, O'Keefe said to Taylor that he would furnish them the money to take the claims and if they wanted to sell after they got title he would give them \$150 over and above all expenses. It was with that understanding that he took up the claim—that he was to sell the claim. O'Keefe furnished the money for the expenses from Lewiston to Pierce City and paid for the horses and other expenses from there on to the timber. They were five days going to and returning from the timber, and Taylor did not pay any of this expense; O'Keefe paid it all (pp. 1112 to 1114). He went to view the claim in October before filing in the following April (p. 1113). The party that accompanied Taylor consisted of Prentice, Dammarell, O'Keefe, and his brother. He knew that Kester and O'Keefe were in partnership at that time in connection with the Cloverland Irrigation Company; Kester was the president of the company (pp. 1114-1115). Taylor went to Lewiston a week before filing and joined the line of people at the land office. His brother, O'Keefe, Prentice, and Dammarell were also in the line. O'Keefe gave them the money to pay their filing fees at the land office (pp. 1115-1116). Later he made proof with the money O'Keefe had given him for that purpose in the

land office building. He paid \$400 at the land office, all of which he had received from O'Keefe in cash. O'Keefe also gave him \$100 at that time with which to pay location fee. Dwyer located him, and though there had been no agreement with him to pay a location fee, O'Keefe gave him \$100 and told him to pay it to Dwyer. He paid it to him about the land office; it was a new \$100 bill which he gave to Dwyer (pp. 1117-1118-1119). All the money that he paid into the land office at final proof he received from O'Keefe and the statement that he made in the land office, that part of it he had laid away and part of it he had borrowed, wasn't exactly true (p. 1119). He signed the deed either the day or the day after he made proof and was given the \$150 by O'Keefe (p. 1125). Taylor made proof July 11, 1904, and on the following day executed a deed to Kester and Kettenbach, conveying title to his land, and received \$150. The deed was recorded at the request of Lewiston National Bank, January 20, 1906 (pp. 1132, 1134).

THE DAMMARELL ENTRY.

Edgar H. Dammarell, a brother-in-law of Joseph H. Prentice, who resided at Cloverland, Wash., in 1904, made a Timber and Stone entry April 25, 1904. He was acquainted with Charles and Edgar J. Taylor and Jackson O'Keefe (pp. 1171 to 1173). Dammarell said Charles Taylor solicited him and Prentice at Cloverland to make a timber land entry, saying that he was going to take up a timber claim, and requested Dammarell and Prentice to do the same. Dammarell told him that he did not have the money. Dammarell

thinks that in the conversation with Taylor something was said as to the value of the claims and what they would net them (p. 1174). O'Keefe furnished Dammarell all incidental expenses of going to and from viewing the timber claim; the fee for preparing entry papers and for filing the same at the land office; the expenses of Dammarell of going to the land office from his home and return at the time he filed and also at the time he made his proof, and even paid the hotel bills, and gave him the \$400 with which he made proof. O'Keefe gave him this money at the Lewiston National Bank Building on the date that he made proof. On the same day O'Keefe also gave him a \$100 bill to pay Dwyer as a location fee. This he paid Dwyer in the hall outside the land office immediately after receiving it. He made the deed to O'Keefe of his claim the next day and O'Keefe gave him \$150 (pp. 1174 to 1190).

"Q. And you got just exactly what Mr. Taylor told you you could get for it when he first talked with you? (p. 1189). —A. That is the point that I don't positively remember—what Mr. Taylor said. Mr. Prentice and I disagree as to what Mr. Taylor said at that time. We have talked it over several times, and I don't remember it as he does; possibly his memory is better than mine" (p. 1190). Dammarell made proof July 25, 1904 (p. 1195). The deed of Dammarell conveying the claim to O'Keefe is dated July 26, 1904, and O'Keefe in turn quit-claimed the title to the claim to Kester and Kettenbach, July 30, 1904, both of said deeds being recorded, at the request of the Lewiston National Bank, in January, 1906 (p. 1700).

THE BINGHAM ENTRY.

David S. Bingham resides at Asotin, Wash. He testified that at the time he made his entry, April 25, 1904, he was working for O'Keefe and Kester, being Jackson O'Keefe and George H. Kester, as foreman, at a salary of \$75 a month (pp. 1139-1140). Jackson O'Keefe induced him to take up a timber claim. O'Keefe had been connected with Kester and Kettenbach in regard to the timber proposition and he asked why Bingham didn't take up a timber claim himself. He said "You have used your money up there; I don't see why you don't get some of it back." O'Keefe said he had better go down and file, which he did. He had been over the land prior to that (pp. 1141-1142). No one went over it with him to point the land out. He never talked to Kester, Kettenbach, or Dwyer. Did all business with O'Keefe. Bingham's understanding was that he had to take this claim and O'Keefe was to have the prior right of buying it after Bingham proved up. Nothing was said about the price at that time. Bingham knew that O'Keefe was in the business of assembling a great many timber claims with Kester and Kettenbach. It was his understanding that O'Keefe was a middleman working for Kester and Kettenbach (p. 1142). He was led to believe this by his conversation with O'Keefe (p. 1143). O'Keefe said he was connected with Kester and Kettenbach and would like to have a prior right to buy his claim if he felt disposed to dispose of it and that he mentioned others that he had bargained for. This conversation was before Bingham filed. When Bingham filed he was away from business probably three or four

days. This was not taken out of his salary. He was also absent from two to four days at the time he proved up. O'Keefe directed him to Lawyer Smith's office to get his filing papers. He did not give Smith any information concerning the claim and did not pay any fee for making out the papers (pp. 1144 to 1146). Bingham paid his filing fee and expenses of both trips to Lewiston but was reimbursed when he had a settlement with O'Keefe (p. 1146). Dwyer claimed he located Bingham but he had no connection with him concerning the claim up to the time he made proof. Bingham advised O'Keefe that the day to make proof had arrived. He told him to go to Lewiston to see Dwyer and Dwyer would fix it up all right in regard to witnesses (pp. 1149-1150). Bingham went to Lewiston and met Dwyer in front of the Lewiston National Bank. Dwyer said "You are proving up to-day." Bingham said "Yes; that is what I came down for"; and Dwyer put his hand in his pocket and pulled out a roll of greenbacks. He counted out \$100 and asked Bingham to hold it. Dwyer then took the \$100 from him and put it in his pocket and he said, "That's mine; that is for locating you" (p. 1150). He then said, "Now, here is \$400—four hundred and odd dollars. You go up, and I will be up pretty quick and we will prove up." Bingham took the money and walked around for a few minutes, then went to the land office and met Dwyer in the receiver's office (p. 1151), and he then made proof and paid for the land with the money he had gotten from Dwyer just a few moments before. He did not give a note for the money he received from Dwyer. Later he deeded the land to

Jackson O'Keefe. He did not read the deed (pp. 1151-1152). The day Bingham made the deed O'Keefe said "We might as well settle this here proposition up in regard to that land" (pp. 1153-1154) * * *

"Well, now, the arrangements is to let you have over and above all expenses that you was to down there, \$150." He said he had made similar arrangements for the Taylor boys (p. 1154). He gave Bingham his personal check for \$150 and Bingham acknowledged the deed (p. 1154). O'Keefe told Bingham that he had given Dammarell, Prentice, and the Taylor boys \$150 over and above all expenses and he would give him the same, and he told him he would take it (p. 1161). O'Keefe told Bingham that he, Kester, and Kettenbach were in together; that he (O'Keefe) was working as a middleman; and if these claims went through he would get a certain per cent out of them (p. 1163). Dwyer did not go over this claim with Bingham. Never had any transactions with him relative to the claim other than on the day he made final proof. Dwyer gave him no reason why he should pay him the location fee. He simply took it out of this money that he handed Bingham. Bingham said if that had been his \$516.00 he wouldn't have given him that location fee. He would have had no reason to. As it was "I didn't care what he done with it." The first talk he had with O'Keefe about taking up this land, they talked about his having the prior right or preference right. As a matter of fact it was Bingham's understanding at the time that he was going to convey the claim to O'Keefe after he got it (pp. 1166-1167). He does not think he would have taken the land up at

that time if he hadn't had that understanding. The matter turned out just exactly as he understood it would when he first talked to O'Keefe about it, and he did just what he told him in the whole transaction (pp. 1167-1168). Bingham made proof July 15, 1904 (p. 1140). At the Land Office Bingham testified that the money with which he purchased the land he had saved from his earnings and had had it in his actual possession for two years (p. 3862). Bingham conveyed the title to his claim to O'Keefe by deed dated July 26, 1904, and O'Keefe executed a quit-claim deed to Kester and Kettenbach for said land July 30, 1904. Both of said instruments were recorded in January, 1906 (p. 1482).

SUMMARY OF EVIDENCE CONCERNING THE O'KEEFE GROUP.

The testimony of Robnett mentioned herein relative to the conversation he heard at the Lewiston National Bank in the fall of 1903 or the spring of 1904 between O'Keefe and Kester and Kettenbach, in which said entrymen forming this group were named as persons that O'Keefe could secure to file on timber claims, and who would convey title to the same as directed, for from \$150.00 to \$200.00 each, and that O'Keefe was then authorized by Kester and Kettenbach to pay the expenses of said persons in connection with their claims and draw his check upon the bank in the necessary amounts, said checks to be held as cash items which Kester and Kettenbach would take care of, and on the day of proof the location fee of each entryman was paid by a one-hundred-dollar bill, which was passed to first one entryman and then another and

returned to the bank in the evening, is corroborated by the testimony of the entrymen, by Kester, and by the attending circumstances. Charles W. Taylor testified that O'Keefe stated such an agreement to him, and suggested that he make the same proposition to his brother, Prentice, and Dammarell, and this he did.

Kester, on direct examination, said:

But I remember another conversation with Mr. O'Keefe. I think it was before he went up into the timber. And he said that he had been talking with his nephews, I think, about going with him up into the timber, and that he had told them that he would like to take them in there and buy their claims. I told him that he couldn't make any such agreement with them; that that would be contrary to the law, and that he couldn't have any such agreement of that kind (p. 3157).

And on cross-examination of Kester the following appears:

Q. And you let the O'Keefe entrymen have the money with which to make proof?

A. No, sir.

Q. Did you let O'Keefe have it?

A. Well, I loaned Mr. O'Keefe some money.

Q. Wasn't it for these entrymen to make their proof?

A. I presume it was (pp. 3223-3224).

Kester did not testify until some time after Robnett had testified, and if Robnett had not actually heard the conversation he recited it would have been impossible for him to have so accurately guessed or imagined what really did take place. The fact that after the

agreements had been made with entrymen, Kester told O'Keefe that it was unlawful to make such agreements, and that O'Keefe advised the entrymen of what Kester said, should not be given weight in view of the fact that Kester and O'Keefe and the entrymen proceeded to do just what it had been originally agreed that each should do. O'Keefe furnished each entryman practically every dollar which was used in the transaction, except the few dollars that Bingham used as a filing fee. Each entryman, either the day after or shortly after making proof, conveyed to O'Keefe or to Kester and Kettenbach and received the \$150 originally promised. O'Keefe quit-claimed to Kester and Kettenbach the titles to the claims conveyed to him a day or two after said deeds were executed, but neither the deeds from the entrymen to Kester and Kettenbach nor the deeds from the entrymen to O'Keefe nor the quit-claims deeds from O'Keefe to Kester and Kettenbach were recorded for 18 months after their date. Robnett's statement that a hundred dollar bill was handed to each entryman to pay the location fee and was returned to the bank at the end of the day by Dwyer is also corroborated, in effect, by the testimony of the O'Keefe entrymen.

In some of O'Keefe's transactions he overdrew his account at the Lewiston National Bank and gave notes later for these overdrafts. The notes were from time to time renewed and a larger note given for the amount of the face of the note and interest, and later these notees were paid by Kester. As will be further shown in the summary of all the entries in the line up, O'Keefe's

received the money for the filing fees from Dwyer, and Dwyer got said money by drawing a check on the bank, which Kester and Kettenbach afterwards paid after the same had been by mistake charged to the account of Kittie E. Dwyer.

Charles W. Taylor testified that he was a nephew of Jackson O'Keefe and that O'Keefe and Kester were together in the irrigation business (pp. 1058-1059). When they started for the timber O'Keefe told Taylor that George H. Kester and some more of them were taking up claims; that Kester was going in with a crowd to take up claims; "I don't remember whether he said he was taking them up for himself, or just how he did say it" (pp. 1062-1063). Taylor at the time of entering a claim was in the employ of Kester and O'Keefe (p. 1061), and O'Keefe told him that he and Kester were taking up this land and that Taylor was to convey the same to him and receive \$150. "Q. Now did I ask you what you were to do with this land, in your first conversation with Mr. O'Keefe, what you were to do with this land to make that \$150? A. What was I to do with it? Q. Yes. A. I was to sell it to him. Q. Were you to sell it to him or some one else? A. Well, he was the one I was dealing with; he never told me about selling it to—never mentioned nobody else's name about me selling it to" (p. 1069). In the first conversation Taylor had with O'Keefe, O'Keefe said that he and Kester were going into the timber and take timber (p. 1081). O'Keefe said that he and Kester were in together; that they were going into the timber and take up claims (pp. 1084-1085).

Q. What did he say about Mr. Kester?

A. He said that him and Kester was in together, just as that affidavit said there, that they was going into the timber to take up claims (pp. 1084-1085).

Q. What about other people taking up claims?

A. Well, that is what he said, that they was, him and the parties was, going in to take up claims.

Q. For whom?

A. For him and Kester.

Q. And who was it your understanding was to get your claim?

A. Mr. O'Keefe was to get mine and he was to turn it all over to Kester himself (p. 1085).

Bingham said that at the time he made his entry he was working for O'Keefe and Kester as a foreman at \$75.00 per month (p. 1140); that O'Keefe had been connected with Kester and Kettenbach in regard to the timber proposition (p. 1141). Bingham knew that O'Keefe was in the business of assembling a great many timber claims with Kester and Kettenbach. It was his understanding that O'Keefe was a middleman, working for Kester and Kettenbach, and he got this understanding from O'Keefe (p. 1143); that O'Keefe said he was connected with Kester and Kettenbach and would like to have a prior right to his (Bingham) claim, and mentioned others that he had bargained for (p. 1154).

C. W. Taylor further testified that O'Keefe told him that he was going to take up a claim and requested him (Taylor) to take one too. O'Keefe requested Taylor to solicit his brother, Edgar J. Taylor, and Prentice and

Dammarell (Prentice and Dammarell being brothers-in-law) to enter claims also. This conversation was in the fall before they filed April 25, 1904. The proposition that O'Keefe made to Taylor was that he would furnish all the money necessary to take up the claims and then give them \$150.00 apiece over and above the expenses for the claims. Taylor made this proposition to his brother and then went to the home of Prentice and Dammarell, fifteen miles distance from Taylor's home, and repeated to them what O'Keefe had said, and they all agreed to enter the claims under those conditions. Later and before they went to view the land Prentice and Dammarell saw O'Keefe personally and talked with him about the matter, and O'Keefe then agreed with them to furnish all of the money and incidental expenses for the taking up of the claims.

O'Keefe, the two Taylors, Dammarell, and Prentice went to view the timber together. O'Keefe paid all the expenses of the two Taylors, Prentice, and Dammarell from their homes to the timber and back again, the railroad fare of Prentice and Dammarell, and all incidental expenses when they went to the land office to make their filings, paid for the preparation of their filing papers, their filing fees, and for publication of the Taylors, Prentice, and Dammarell; the expenses of Dammarell and Prentice from their home to Lewiston and return at the time they made proof, and gave the four of them \$400.00 apiece on the day of proof with which to purchase the land, and on the same day gave each of them a new one hundred dollar bill to hand to Dwyer as a location fee.

The Taylors made their proof July 11, 1904. The next day each of them conveyed their claim to Kester

and Kettenbach and received \$150.00, said deeds being recorded a year and a half later, i. e., January, 1906. Prentice made proof July 11, 1904, and received \$150.00, and the latter quit-claimed the claim to Kester and Kettenbach five days later, the latter deed being recorded in January, 1906.

Dammarell made proof July 25, 1904, conveyed his claim to O'Keefe the next day and received \$150.00. O'Keefe quit-claimed the title he had thus acquired to Kester and Kettenbach four days later, and said deed was recorded a year and a half later, i. e., January, 1906. The fact that O'Keefe conveyed the claims to Kester and Kettenbach by quit-claim deeds indicates that he was merely acting as an agent for Kester and Kettenbach and as a conduit through which the title passed.

Jackson O'Keefe made his entry April 25, 1904; made his proof and paid for the land July 11, 1904 (p. 1424); and receiver's receipt was recorded by George H. Kester September 2, 1904. O'Keefe conveyed to Kester and Kettenbach by deed dated June 16, 1906 (pp. 1712, 1713). O'Keefe was dead at the time of taking testimony in these cases, but enough has been said to show that he took up the claim for Kester and Kettenbach.

Bingham made proof July 15, 1905, conveyed his title to O'Keefe July 26, 1904, and received \$150. O'Keefe executed a quit-claim deed to Kester and Kettenbach July 30, 1904, and that deed was recorded in January, 1906.

The circumstances surrounding the Bingham entry are significant for a number of reasons, but especially as bearing upon the bona fides of the location fee that was handed to Dwyer by the entrymen forming the

O'Keefe group and others forming the line-up, which are mentioned later, and leading strongly to the conclusion that the passing of a one hundred dollar bill or other amounts in a different form to Dwyer as a pretended fee for location were merely to lend color and give the transaction the appearance of legality and to make evidence to be used on some future occasion.

Thus Bingham testified that O'Keefe sought him and induced him to enter a timber claim, his understanding being that O'Keefe was to have the prior right to buy it after proof. He was not located on the timber by anyone, having been over the claim some time before by himself. Up to the day that Bingham made proof he had no conversation or relations with Dwyer relative to the claim. On that day Dwyer accosted him on the streets of Lewiston and said "You are proving up to-day." Bingham replied: "Yes; that is what I came down for." Dwyer then put his hand in his pocket and pulled out a roll of greenbacks. He counted out \$100 and asked Bingham to hold it. Dwyer then took the \$100 from Bingham and placed it in his pocket with the remark "That is mine; that is for locating you." Dwyer then said, "Now, here is \$400—four hundred and some odd dollars. You go up and I will be up pretty quick and we will prove up." Bingham said that if the \$516 had been his he wouldn't have given Dwyer any location fee; that he would have had no reason to, but as it wasn't his money "I didn't care what he done with it." When Bingham made his deed O'Keefe said: "We might as well settle this proposition up in regard to that land. Well, now, the

arrangement is to let you have over and above all expenses that you was to down there, \$150," stating that he had made a similar arrangement with the Taylor boys.

From the foregoing and the testimony of the O'Keefe entrymen as to what they agreed to do and what O'Keefe agreed to do in regard to their entering the timber claims and what each of them did do step by step throughout the entire transaction, there can be no question that each of these claims was entered upon an understanding or agreement made prior to entry that in consideration of O'Keefe furnishing all of the money necessary to purchase the land and all incidental expenses in connection with the entry, that the entrymen would convey their claim to him or to whomsoever he would direct for \$150.00; nor can there be any question that the conversation recited by Robnett occurred between Kester, Kettenbach, and O'Keefe before the initiation of any of said entries and that he truthfully recited what he heard and that in the entire transaction O'Keefe was acting as the agent or co-conspirator of Kester and Kettenbach, and what he did and what he said, and what he commissioned Charles W. Taylor to do and say in furtherance of their unlawful design were binding upon, and in law were the acts of Kester and Kettenbach.

If O'Keefe was not acting as the agent of, or in conjunction with, Kester and Kettenbach in the procurement of these entries for Kester and Kettenbach, upon what theory of logic could it be concluded that O'Keefe would seek out four or five impecunious persons; suggest to them the taking up of a timber claim; agree to

furnish them all of the money for that purpose; accompany them to the timber, to the land office when they filed, and to the land office again when they made proof; there being nothing in it for him, not even the location fee, that being formally handed from him to the entrymen and by them to Dwyer? In fact the court said: "Were a case of fraud in the entry shown (Taylor entry) it might very well be concluded that the defendants, if they did not participate therein, at least had knowledge thereof, or were put upon inquiry relative thereto, by reason of their dealings with O'Keefe" (p. 329).

It seems to us that the evidence as a whole is conclusive to the point that said entries were fraudulently made, and that Kester and Kettenbach and Dwyer were parties to the fraud, and that the facts and circumstances surrounding these entries are as strong, if not stronger, than the facts and circumstances upon which the court held other entries in these cases to have been made in fraud of the statute.

The trial court, speaking of the entry of Charles W. Taylor, said in substance that the evidence in relation to this entry is unsatisfactory and insufficient to justify the cancellation of the entry, and that in the examination of Taylor, counsel for both sides indulged in questions which were highly leading; and after stating the agreement testified to by Taylor whereby O'Keefe was to purchase the claim and pay therefor the specified sum of \$150 and to furnish all the funds necessary to secure title, further said that later and some time before the entry was made O'Keefe told him, Taylor, that he had learned that such an agree-

ment could not lawfully be made; and again, "but his (Taylor's) final word, while upon the witness stand, was to the effect that he had no understanding or agreement by which he was to sell to O'Keefe or to any other person" (pp. 339 to 342). The court then quotes at length from the testimony (pp. 339 to 342). Though these observations were made in reference to the Taylor entry, they seem to have affected the court in reaching its conclusion in respect to the other entries in this and the other groups.

During the investigation in 1905 of the entries involved in the present cases, Taylor made an affidavit for the inspectors for the Interior Department as to the terms upon which he made his entry and of his agreements with O'Keefe. Later he testified before the grand jury on several occasions relative to said entry and also at two trials at which Kester and Kettenbach were on trial charged with criminal conspiracy in connection with their acquisition of the lands involved in the present cases. After the conviction of Kester and Kettenbach at one of the trials mentioned at which Taylor had testified, and while the present cases were pending, the law partner of one of counsel for the defense in the present cases presented to Taylor at his home a copy of the testimony he had given at the trial aforesaid and told him to read it (p. 1077). Later (November 10, 1910) and while the present cases were still pending, defendants secured an affidavit from Taylor (and also from each of the entrymen forming the O'Keefe group, the Steffey group, and other entrymen, which will be hereafter mentioned) somewhat at variance with the testimony he had given before on the

occasion mentioned (p. 4125). Though Taylor appears to be illiterate, he possesses quite a degree of shrewdness, which he exercised on a number of occasions while testifying in the present cases, in what seemed an endeavor on his part to shade his testimony given at former trials, where that testimony tended to show an unlawful agreement between himself and O'Keefe relative to his entry. And while he did not evince any real hostility toward the Government, he was very susceptible to a sympathetic and friendly cross examination conducted by counsel for the defense. In such circumstances it would seem permissible for counsel for the Government to indulge in leading such a witness and to cross-examine him in an effort to get such witness to testify truthfully concerning transactions, and no greater weight should be given to testimony of such a witness elicited on cross-examination by the defense than by that brought out by the Government in response to leading questions, notwithstanding said witness was called to testify by the Government. The statement made by Kester to O'Keefe and by the latter repeated to the entrymen, that it was unlawful to make an agreement before entry to sell, was entirely unnecessary, as O'Keefe and the entrymen knew that such an agreement was unlawful, and it was merely made as a subterfuge by which Kester and O'Keefe hoped to successfully evade the timberland law, and to escape the consequences of their unlawful conduct should they be brought to trial therefor.

This entry and all other entries involved in the present cases were procured to be made, and the cases tried upon the theory announced by Kester when the entry-

man Cornell advised him that an inspector was investigating the Cornell and other entries, and mentioned the fact that the Government was also investigating violations of the timber law in Oregon and other States. Kester said: "All that man is here for is to look into some timber trespass cases, * * *." "Oh, well, nothing of that kind will happen in Idaho. If there should something of that kind occur, why I would be the man they would be after. *You, Dwyer, and I are the only persons that know anything in regard to this agreement. If we all deny it, how can any trouble come to us?*" (p. 2823).

THE KESTER-KETTENBACH-DWYER GROUP.

THE WILSON ENTRY.

In the fall before entering the claim, April 25, 1904, Guy L. Wilson saw Dwyer concerning the matter and Dwyer told him he could borrow the money for him to enter a claim and that when the claim was sold and the location fee was paid and all expenses were deducted, Wilson would get \$150.00 for the claim (pp. 377 to 380). At the time of the first conversation between Dwyer and Wilson the latter did not know to whom he was to sell the claim. He supposed Dwyer would sell it for him (p. 380). Dwyer was to furnish all the money (p. 385). Wilson went to view the claim with his mother-in-law, Mrs. Frances Justice-Clausen, Dwyer, and others (pp. 381-382). On this trip they were away from Lewiston several days and Wilson did not pay any of the expense of travel or hotel bills (pp. 382-383). In the following spring Dwyer advised Wilson of the time to file and told him to join the line at the land office (p.

384). Wilson did not pay the lawyer who prepared the fees at the land office the day he filed (pp. 387-388). Wilson was in line at the land office a part of seven days before filing and the rest of the time his position in the line was held by a Mr. Case. Dwyer gave Wilson \$14.00 to pay Case for holding his place (pp. 388-389). Wilson asked Dwyer if he would have to perjure himself at the land office in making his Sworn Statement. Dwyer told him he had no agreement and that he was taking it up for his own use and benefit, as he would be benefited by it (pp. 393-394). On the day of making final proof Dwyer gave Wilson \$500.00. Dwyer told him to return the \$100.00, which was in one bill. This Wilson did and Dwyer then said he had paid him the location fee. The balance of the money, \$400.00, he received from Dwyer, he paid into the land office in payment for the land that day. When Dwyer gave Wilson the \$400.00, the latter made a demand note to Kester and Kettenbach (pp. 395 to 397). On the afternoon of the same day he went to Otto Kettenbach's office with Dwyer and executed a deed conveying the claim to Kester and Kettenbach. Nothing was said by either Dwyer or Wilson about selling the claim after the first conversation they had about the claim before Wilson filed. He delivered the deed to Dwyer and received \$136.00. The entire transaction turned out exactly as it was outlined to Wilson by Dwyer at that first talk about the claim, and Wilson received exactly what he expected to get with the exception that he did not get the \$14.00 paid Case (pp. 397 to 403). Wilson admitted that the answer he gave in the land office that the money he used he had saved from his earnings and had

had the same for two and a half years was not true, and that he had gotten the same from Dwyer within an hour before making the statement (pp. 403-404). When Wilson executed the deed at Kettenbach's office, he was proceeding on the understanding that he had with Dwyer when he first talked with him about the claim. Dwyer gave him \$136.00 in cash at Otto Kettenbach's office. There was no discussion between them relative to the amount Wilson was to receive between the time they first talked about the claim and when he gave Wilson the \$136.00, and it was not discussed then. Dwyer simply handed Wilson the money (pp. 405-406). At the trial of Dwyer in 1907 on a criminal charge growing out of the same transaction, Wilson testified that: "Mr. Dwyer said all our expenses would be paid and we would get about, when we could turn these over, he could make about \$150.00 out of this for us. Q. Now, give the exact language so that the jurors can hear it, what he (Dwyer) said to you. A. Well, he said that it would not cost us anything to take the trip and that there would be about \$150.00 in it for me," and relative to the sworn statement Wilson also testified: "He (Dwyer) said that this agreement that I had with him was only verbal and that wouldn't stand in the road at all, that I was taking this land up for myself, that I would derive the benefit from it." Wilson testified that the answers that he made at the land office were false and that Dwyer induced him to make them (pp. 408 to 412). On the day that Wilson made proof he gave Dwyer the final receipt. Later, when the Land-Office inspectors were investigating the transactions of Kester and Kettenbach, Dwyer returned the receipt to Wilson

and instructed him to keep it, saying that there were inspectors around, and that if they asked him whether he owned the land for him to say that he did and ask them whether they wanted to buy it (pp. 419 to 420). Wilson made proof July 13, 1904 (p. 376). The deed of Wilson's conveying the title to his claim to Kester and Kettenbach was dated the same day, but was not recorded until June 24, 1907, and then at the request of the Lewiston National Bank (p. 1519). The demand note that Wilson made to Kester and Kettenbach the day he made proof was delivered to Wilson's wife later in the day. After the deed was made she went to the Lewiston National Bank, asked for the note, and the same was delivered to her without paying the same (p. 443). Mrs. Wilson heard a conversation between Dwyer and her husband relative to the answers that Wilson should give at the land office to questions that would be asked him. She said: "Mr. Dwyer said he wanted to give Mr. Wilson some pointers on the questions that he had to answer, and he said to tell them that he had the money, or its equivalent, to pay for his claim, and Mr. Wilson asked if he had to perjure himself when he answered the question, and Mr. Dwyer said not to worry about that—it was a thing which was done every day"; that Dwyer also said that the agreement between them was only verbal, but that Mr. Wilson would get the money just the same (pp. 435 to 441). This is another instance of the \$100 bill being handed to the entryman and then back to Dwyer as a pretense of paying Dwyer a location fee. This evidence also shows that the conspiracy entered between Kester, Kettenbach, and Dwyer, and their concerted action in regard to the un-

lawful acquisition of timber claims, was still in full force and operation. The court in holding this entry invalid, and in ordering that it be canceled, said: "I am satisfied from the testimony of the entryman, reluctantly given, that, while there was no express agreement *there was a perfect understanding* between him and the defendant, Dwyer, acting as the agent for Kester and Kettenbach, that all the expenses incident to the acquisition of title should be paid by Dwyer and that the entryman was to receive \$150, in consideration of which he was, upon acquiring title, to convey the same to Kester and Kettenbach. It is not necessary to decide whether or not Kester and Kettenbach had any actual knowledge of the arrangement with Dwyer; Dwyer being their agent, they are charged with notice" (p. 286).

THE EDNA P. KESTER ENTRY.

Edna P. Kester, wife of defendant, George H. Kester, and sister of Mamie P. White, testified that she entered a timber claim April 25, 1904 (pp. 736-737). Dwyer located her on the claim. She went into the timber in October, 1902. Mr. and Mrs. Wm. J. White, Mrs. Elizabeth White, Elizabeth Kettenbach, Martha Hallett, George H. Kester, and Dwyer composed the party. Mrs. Hallett was a close friend of the Kester family, and they were boarding with her at that time. George H. Kester paid all the expenses incident to entering the claim and purchasing the land (p. 738). At the time she made final proof she paid something over \$400.00 into the land office, which she got from her husband the morning she made proof. She has not sold the claim and still has it (pp. 739-740) and holds the same for Kester, Kettenbach, etc.

THE FRANCES A. JUSTICE ENTRY.

Frances A. Justice, now Frances A. Clausen, entered a timber claim April 25, 1904. She testified that she is the widow of David Justice, who died five years ago, and the mother of Fred Justice, who also died about five years ago (p. 845). Dwyer located her on the claim. Before going to view the claim, which was five months before she filed, she had an agreement with Dwyer whereby he was to furnish her all the money incident to filing on the claim and making proof and purchasing the same. He did not tell her how much she would get out of the claim, but, after figuring at the prices claims were then selling, it would be somewhere about \$200.00 more than the expenses (pp. 855 to 858). Mrs. Clausen had told Dwyer that she did not have the money to take up a claim (pp. 1367-1368). Dwyer paid her expenses to and from the claim. He furnished her with the money to pay for the location fee, and for filing, and to pay for the land at final proof (pp. 1367 to 1387). Though Mrs. Clausen received the money for final proof from Dwyer, at the land office, in response to the question where she had received the money and how long she had had the same in her actual possession, answered that she sold fruit and had had it in her possession one month (p. 1389). On the day Mrs. Clausen made proof she gave the final receipt to Wm. Dwyer, and Dwyer gave her \$150.00 and she went to the bank, and the note which she gave Dwyer earlier in the day was returned to her. Dwyer told her to go to the bank and get it (pp. 1397-1398). Mrs. Guy Wilson accompanied her, and Guy Wilson's note was given Mrs. Wilson at the same time (p. 1399).

Mrs. Clausen testified at the trials of Wm. Dwyer in the fall of 1906 and of Kester, Kettenbach, and Dwyer in the spring of 1907. Just before the trial in 1907 Mrs. Clausen left her home without advising the family where she was going and went to Spokane, Washington. Upon reaching Spokane she immediately purchased a ticket for Seattle, and at Seattle she registered at the Tourist Hotel as Mrs. Frances. From Seattle she went to Vancouver, and she registered at the Empire Hotel as Ada Crocker. From there she went to Victoria. From Canada she returned to Moscow, while the trials were in progress, in the company of Mr. Glover, a Government officer. At the criminal trials just referred to, Mrs. Clausen testified that she had an agreement with Dwyer. In explanation of why she had sworn falsely in her sworn statement and at final proof at the land office she stated that Dwyer had told her that it was only a verbal agreement, and a verbal agreement was no agreement (pp. 850 to 855, 1370 to 1396, 1397 to 1412). The receiver's receipt issued to Frances Justice the day she made final proof, July 13, 1904, was recorded March 30, 1906. On that date Frances A. Justice executed a deed conveying her claim to Kittie E. Dwyer, which was recorded later at the request of Wm. Dwyer (p. 1497). The deed or contract made by Mrs. Clausen the day she made proof is not of record. The claim entered by Frances A. Justice was assessed to her for the year 1905, but the taxes thereon were paid by Kittie E. Dwyer for that year. The claim was also assessed in the name of Frances A. Justice for the year of 1906, and for that year the taxes were paid by Kittie E. Dwyer, and, though assessed to

Frances A. Justice for year 1907, the taxes were paid by Kester and Kettenbach (p. 1538). As to the entry, the court said: "While the evidence of a prior agreement is not so conclusive as that in relation to the Wilson entry, I am satisfied from all the facts and circumstances, including the attitude and conduct of the entrywoman herself, and the failure of the interested parties to explain certain incidents exclusively within their knowledge, that the entry was initiated with an understanding between the entrywoman and Dwyer that she should receive a specified amount, free of all expenses, and should convey the title to or in compliance with the demands of Dwyer. The patent in this entry is therefore held for cancellation" (pp. 287-288).

THE ELIZABETH KETTENBACH ENTRY.

Elizabeth Kettenbach has resided at Lewiston for eight years. She testified that she is a sister of Frank W. Kettenbach and an aunt of William F. Kettenbach. She made a timber entry April 25, 1904 (pp. 1557-1558). She went to view the claims with Kester and his wife, Mr. and Mrs. White, and Mrs. Hallett. George H. Kester made the arrangements, because she remembers paying him her part of the cost of the trip, \$22.25 (pp. 1558-1559). She viewed the land in October, before she filed (p. 1560). Does not know who prepared her filing papers, nor does she remember of paying a fee for that service (p. 1561). Mrs. White and she took their places at the end of the line at the land office. Will Kettenbach might have suggested Mr. Dwyer's name as locator (pp. 1563-1564). She paid Dwyer \$100.00 in cash the day they proved up (p. 1564). Paid four hundred and some dollars to the

land office in cash upon making final proof. She borrowed \$500.00 from her nephew, William F. Kettenbach, with which to make proof (p. 1566). She received this money at the bank and went directly from the bank to the land office and paid the money in (pp. 1567-1568). At the land office they asked her where she received the money that she was paying into the land office and how long she had had the same in her actual possession, and she thinks she told them she inherited the money. She remembers saying in answer to question 17 that she got the money from the sale of real estate and had had the same in her possession for 6 months (pp. 1568-1569). The title to this claim is still in Elizabeth Kettenbach, but Kester, on February 14, 1906, gave an option on the same, claiming it as his and Kettenbach's (pp. 2125, 3937). Said tract was assessed by the tax assessor in the name of Elizabeth Kettenbach for the year 1905, and the taxes for that year were paid by her. For each year since, the property has been assessed in her name, but for the years 1906 and 1907 the taxes were paid by the Idaho Trust Co. For the year 1908 taxes on the claim were paid by Kester and Kettenbach (pp. 1539-1540). At final proof at the land office Elizabeth Kettenbach swore that the money with which she purchased the land she had received from the sale of real estate and had had it in her actual possession for 6 months, when in fact she had received it from W. F. Kettenbach but a few minutes before (p. 3896).

THE ELIZABETH WHITE ENTRY.

Elizabeth White, the mother of Wm. J. White and mother-in-law of W. F. Kettenbach, made a timber-

land entry April 25, 1904. Mrs. White testified that Dwyer located her and she paid him \$100.00 or \$200.00 for that service after she filed. She viewed the timber in October before she filed in April. She talked with Wm. F. Kettenbach about taking up a claim and told him she was going to file. Paid \$400 or \$500 in the land office when she made proof. The claims, the title to which passed through her name, she knows very little about. She knows little about the claim she entered. Referring to the Robnett claim, she says she supposes Robnett borrowed the money from W. F. Kettenbach and that the claims were in settlement of the money loaned. The matter was all attended to by W. F. Kettenbach. She does not know that she ever sold a timber claim (pp. 743 to 768). An option was given on this claim by Kester Feb. 14, 1906, in which he referred to it as our timber (pp. 2125, 3937). In 1905, 1906, 1907 said claim was assessed for taxes in the name of Elizabeth White, but were paid by the Lewiston National Bank (p. 1540). Further mention will be made of this claim in connection with the transfer of Robnett's and other claims through Mrs. White's name, which will show that she acted as the agent for Kester and Kettenbach in the entry of this claim as well as in regard to said other claims.

THE WILLIAM J. WHITE ENTRY.

William J. White, son of Elizabeth White, husband of Mamie P. White, brother-in-law of W. F. Kettenbach, and also brother-in-law of George H. Kester, entered a timber claim April 25, 1904. He said Dwyer located him, for which he paid Dwyer \$100. Also made

arrangements for his wife to take up a claim. He talked with W. F. Kettenbach about the claims he and his wife were going to enter and Kettenbach said they were pretty good claims. Thinks he paid \$200 in the land office the day he made proof, also gave his wife the money to pay for her claim. Sold his claim and his wife's to Elizabeth White (pp. 490 to 508). At the date White made proof his bank account was overdrawn at the Lewiston National Bank \$746.07, but he was allowed to overdraw to take up this claim (p. 206). In an option given by Kester February 14, 1906, this claim was referred to as our timber (pp. 2125, 3937). In 1905 and 1907 said claim was assessed for taxes in the name of Wm. J. White and paid by the Lewiston National Bank (p. 1540).

THE MAMIE P. WHITE ENTRY.

Mamie P. White, wife of William J. White, made an entry the same day her husband did. She said her husband had given her money with which she entered and paid for the claim. Dwyer located her and after proof she sold to Elizabeth White (pp. 588 to 600). Dwyer located Mrs. White. She went to the timber with her husband and his relatives. At the date she made proof her husband's account at the bank was overdrawn, as has been heretofore stated. Kester gave an option on this claim and referred to it as our timber, while the title was still in Mrs. White February 14, 1906 (pp. 2125, 3937). In 1905 and 1907 said claim was assessed for taxes in the name of Mamie P. White and were paid by the Lewiston National Bank (p. 1541).

THE HALLETT ENTRY.

Martha E. Hallett made an entry April 25, 1904. She testified that at that time Kester and his wife boarded with her. She had no other boarders (pp. 1592-1593). Kester had attended to her business for a number of years (p. 1603). She spoke to Kester about a timber claim and accompanied him and the rest of his party to the timber in the fall before she filed. Dwyer located her and she paid him \$100 about time she made proof (pp. 1592 to 1598). Got money from Kester to make proof. Does not know whether it was in the form of a deposit or whether she drew a check (p. 1600). Still holds title to claim. Martha E. Hallett did not have an account at the Lewiston National Bank during the months of April, May, June, and July, 1904, at the time she made entry and proof (pp. 2002-2003).

THE GREENBURG ENTRY.

Daniel W. Greenburg made a timberland entry April 25, 1904. He says he went to view the claim in October, 1903, and was located by Dwyer. At date of entry was a newspaper reporter but not regularly employed and did not have the money with which to purchase a claim. Borrowed \$200 or more from the Lewiston National Bank (Kester) to purchase the claim. Negotiated for the loan with Kester and does not know whether Kester made the loan personally or for the bank. Sold claim to Kester shortly after proof. Greenburg made proof July 15, 1904, and executed a deed conveying title to said claim to Kester and Kettenbach August 15, 1904, which deed was recorded by Kester January 24, 1906 (pp. 700 to 713).

THE McMILLAN ENTRY.

William McMillan entered a claim April 25, 1904. He testified that at that time he lived on a ranch about 40 miles from Lewiston and was employed in carrying the mail. In the fall preceding the taking of this claim, Kester was at McMillan's ranch and asked him if he had used his right for the timber claim and whether he was not going to take one. McMillan replied that he did not know anything about timber claims and that he didn't have the money without he mortgaged his ranch, and that he would not do. Kester told him that if he decided to take a claim he would help him out and furnish him the money, which he did (pp. 532 to 535). Kester further told McMillan that he could make \$100 or \$150 out of the claim, over and above the expenses anyhow, and McMillan said he was well satisfied with that if he could make that much. Kester further told him that it would come in the market pretty soon. (The township in which this claim is located was not open to entry at that time) (pp. 535 to 537). McMillan understood that he could turn the claim over to Kester, or Kester and Kettenbach, and as Kester had told him about the claim he would give him the preference (p. 538). He felt under obligations to give Kester the preference right to purchase (p. 550). About a week after this conversation with Kester, McMillan went to see the claim. He was not acquainted with Dwyer but had seen him and heard he was a locator, so he arranged with Dwyer to locate him. Bliss, who was working for Dwyer, located him (pp. 536 to 539). He saw Kester the day he filed and again when he made proof. He received \$300 from

Kester to make proof and did not give a note for the same nor did he pay any interest on the money furnished him (p. 541). "Q. And was there any arrangement or agreement as to when you should repay him, the money you had gotten from him? A. No, well, I don't know; when I sold him the timber claim I would pay him the money" (p. 541). At final proof McMillan, in reply to the question as to where he had gotten the money to pay for the land and how long he had had it in his possession, said that he had "saved it from his earnings" and had it for 6 months (p. 543), and he paid the money he had gotten from Kester to Dwyer at final proof. McMillan conveyed the claim to Kittie E. Dwyer (pp. 545-546). The deal was conducted through William Dwyer whom he understood was doing business with Kester, as Kester told him whatever business he did with Dwyer was all right with him. Before selling claim to Dwyer, McMillan asked Kester if he could sell to Dwyer and whether it would be all right, and Kester replied that it would (p. 543). "Q. How much did he (Dwyer) give you? A. He gave me \$200. Q. Is that all you got? A. I got all my expenses and money to pay for proving up and everything." He gave Dwyer the money Kester had advanced him and then had \$200 clear (p. 544). Would not have sold to anyone but Kester or some one Kester agreed to for that price (p. 547). McMillan made proof July 18, 1904, and the receiver's receipt is recorded April 9, 1906. The deed of McMillan conveying title to his claim to Kittie E. Dwyer is dated April 9, 1906, and is recorded at the request of Dwyer (pp. 1500-1501). This claim was assessed in

the name of McMillan for the years 1906 and 1907, but the taxes thereon were paid for both years by Kester & Kettenbach (p. 1543). On February 14, 1906, Kester included this claim in an option he gave and referred to it as our timber (pp. 2125, 3937). Kester and Kettenbach also paid the filing fees on this claim (pp. 3759, 3758).

As to this claim the court said: "There was some sort of a general promise by Kester, who seems to have been very friendly to the entryman, giving him assistance if he needed financial help when it came to making his final proof. A careful consideration of the entryman's testimony convinces me that he did not have any understanding, expressed or implied, by which he was to sell the land to any person, and that no other person had any interest in the entry. The entryman apparently did feel under some moral obligation to give to the defendant Kester an opportunity to purchase, but such obligation involved only a recognition by the entryman that Kester favored him by loaning him a part of the money required for the final proof" (p. 296).

THE HATTIE ROWLAND ENTRY.

Hattie Rowland, who did not testify, is the wife of Benjamin F. Rowland, entered a timber claim April 25, 1904. Shortly after Kester's visit to McMillan the latter talked with his neighbors, Ben Rowland and his wife, and told them they ought to take up a timber claim and make a little money, too; that they could probably make \$100 or \$200 (p. 547). Mrs. Rowland made proof April 9, 1906, and conveyed her

claim to Kittie E. Dwyer by deed of the same date, which was also the date of McMillan's deed, and it was recorded at the request of William Dwyer (p. 1508). Though this claim was assessed in the name of Hattie Rowland for the year 1907, and the title in Kittie E. Dwyer, the taxes were paid by Kester and Kettenbach (p. 1543), and in the option given by Kester February 14, 1906, the claim is referred to as our timber (pp. 2125, 3937). Kester and Kettenbach also paid the filing fees on this claim (pp. 3758-3759).

The court takes up each part of the evidence pointing to the invalidity of this entry and discusses the same separately and states that there is little significance in such circumstances, but that they are merely suspicious circumstances, and concludes that "It is not thought that it (one of the suspicious circumstances referred to) or all the evidence taken together is sufficient to warrant a finding that the patent was procured by fraud, or that any one of the defendants acquired any interest in, or had any control over, the claim prior to final proof" (p. 295).

In commenting on a bit of evidence and the chain of circumstances establishing the fraud, the court said: "It is suggested that while the lands were assessed in Hattie Rowland during the year 1907 the taxes were paid by Kester and Kettenbach, but there is little significance in the circumstances. It is known that taxes are very frequently paid upon behalf of the owner by agents or friends, and in this case it seems that for the year 1905 the taxes were paid by the Lewiston Abstract Company, although the land was assessed to Hattie Rowland, and during the year 1906, while the assess-

ment was in the name of Hattie Rowland, the taxes were paid by Kittie E. Dwyer. In the years 1908, 1909, the taxes were assessed to and paid by Kittie E. Dwyer" (p. 293). What we have been endeavoring to establish by the evidence is the fact that an agency existed between Kester, Kettenbach, Dwyer, and the several entrymen, and as a link in the proof to that end we have pointed out a number of instances wherein Kester and Kettenbach had paid the taxes on claims, the record title of which was in the names of persons they had procured to make entries for them. In view of all the circumstances surrounding said entries, it is plain that in respect to paying the taxes thereon Kester and Kettenbach were not acting merely as the friends of the entrymen, but in interest of themselves. Whatever agency existed was not that Kester and Kettenbach were the agents of the entrymen, but rather that the entrymen were the agents of Kester and Kettenbach throughout the entire transactions. The title deeds to the entries involved in these suits were kept off the record by Kester and Kettenbach in many instances from one year to two years for the purpose of concealing the fact that they owned the claims, and for the same purpose in other instances the titles were conveyed to other persons in trust for Kester and Kettenbach.

Again, in commenting on this claim, the court, in discussing the option given by Kester and the plats that were attached to it, said, "Upon the plat is a notation to the effect that the *x* indicates lands of Kester and Kettenbach, while the circle indicates lands belonging to individuals. There is no notation as to the class of lands designated by circle X (X). Under

all the circumstances disclosed by the record it is not thought that much significance can be attached to this piece of *evidence alone*. The plats were apparently prepared hastily, and were clearly erroneous in some respects. There was no necessity at the time for being entirely accurate as to the ownership of lands or the precise status of the title. The deed from Rowland to Dwyer was executed a short time after these plats were prepared, and it is entirely possible that the defendant Dwyer at the time had arranged for or knew that he could secure the lands * * *'' (pp. 293-294). The purpose of this evidence to be considered together with other evidence in the case, and not alone, was to establish the fact that Kester, Kettenbach, and Dwyer did own claims jointly and Kester referred to them as "our timber," notwithstanding the fact that in this record he and Kettenbach disclaim any interest in the claim or any connection with Dwyer relative to this or any other claim in the suits. And still further, the court says, "Another circumstance relied upon is the inclusion of the name of the entrywoman in a group of names, and endorsed in the handwriting of the defendant Kettenbach upon a deposit slip, dated April 26, 1904." But while the slip, with its endorsement, may present a suspicious circumstance, it and the other evidence is not sufficient to establish fraud (p. 295).

The deposit slip mentioned was introduced simply to show that the defendants had paid the filing fees of this and 11 other entrymen in the suits, though they denied paying such fees. This payment was made by Dwyer, and the money obtained by him giving his check upon the Lewiston National Bank, and instead

of the check being charged to Kester and Kettenbach or held in the cash, as was customary, it was charged to the account of Kittie E. Dwyer, and the day after such payment, Kettenbach, in order to correct this mistake and to reimburse Mrs. Dwyer's account, made a deposit slip crediting her account the aggregate sum of the amounts paid the several entrymen and wrote the names of each entryman on the back of the deposit slip as a memorandum. Further mention of this deposit slip will be made in its proper place in connection with the other entries.

EVIDENCE BEARING GENERALLY UPON ALL THE ENTRIES IN THE "LINE-UP."

It will be remembered that in the "line-up" of April 25, 1904, there were nineteen persons, all of whose entires are in the present cases, and the names of the nineteen entrymen appear here in the order in which their entries were made at the land office, under the subheading "The line-up."

The entrymen forming the line-up are those whose entries compose the "O'Keefe group" and "Kester-Kettenbach-Dwyer group," hereinbefore referred to.

THE DEPOSIT SLIP.

A deposit slip of the Lewiston National Bank showing a deposit to the account of Kittie E. Dwyer in the sum of \$96.00, dated April 26, 1904, the day after the entries in the line-up were made at the land office, and the notation on the back of the slip and the evidence relating thereto, has an important bearing upon the question of who paid the filing fees for said entries, and affects seriously the credibility of Kester, Kettenbach

and Dwyer, who disclaim paying said filing fees. This bit of evidence was introduced at page 3759 of the record. The writing on both the front and the back of this slip is in the handwriting of William F. Kettenbach, and the following is what appears on either side thereof:

THE LEWISTON NATIONAL BANK, LEWISTON, IDAHO.
Deposited by Kittie E. Dwyer.

4 26-1904.

Two cks given to Wiggin for cash.....	98
50	
48	
—	
Less cash.....	2
	96

(Written on back of deposit slip.)

Guy Wilson.....	8
Greenburg.....	8
Bingham.....	8
McMillan.....	8
Mrs. Rowlands.....	8
J. O'Keef.....	8
Prentice.....	8
E. Taylor.....	8
Dammarell.....	8
Mrs. Justice.....	8
C. W. Taylor.....	8
F. Justice.....	8
	96
J. O'Keef.....	8
	88

Therefore the names on the back of the deposit slip are the names of the six O'Keefe entrymen and six of the Kester-Kettenbach-Dwyer group in the line-up, who, together with the Kester and Kettenbach kinsfolk, complete the nineteen.

It is to be remembered that William Dwyer had no account at the Lewiston National Bank in his own name, but for his personal expenses drew checks on

said bank in his name and that the same were charged to the account of his wife, Kittie E. Dwyer. For expenditures by Dwyer in acquiring timber claims for Kester and Kettenbach and in advancing to entrymen money for their applications, for final proof and for paying their incidental expenses in taking up claims, Dwyer drew checks upon the Lewiston National Bank in his own name and by placing in one corner of said checks the letter "K" with a circle about it, the said checks, instead of being charged to the account of Kittie E. Dwyer, were held in the cash as cash items and later were taken up by, or charged to, the "land account of Kester and Kettenbach."

In a number of instances, expenditures made by Dwyer for Kester and Kettenbach, in which Dwyer's checks were given, the latter would fail to attach the (K) and the same, by mistake, would be charged to the account of Kittie E. Dwyer, and when that mistake was discovered either Kester or Kettenbach would take said checks out and credit the account of Kittie E. Dwyer in that amount, all of which has been mentioned in connection with the (K) checks under the subheading "Circle K checks (K)."

It appears that on April 25, 1904, the date the nineteen entrymen filed in the land office, Dwyer, according to his testimony, gave two checks upon the Lewiston National Bank in the sum of \$48.00 and \$50.00, respectively, for matters connected with Kester and Kettenbach's timber deals, and that the checks were cashed by one Wiggin (pp. 3767 to 3769); and that \$2.00 of these amounts was used by Dwyer personally. To these two checks Dwyer failed to attach the (K) and

on that day the two checks for \$50 and \$48, respectively, were charged to the account of Kittie E. Dwyer. The mistake was discovered and the following day, to correct the error, Wm. F. Kettenbach made out a deposit slip and credited the account of Kittie E. Dwyer the amount of the two checks, less the \$2.00 Dwyer had used for his own purposes; i. e., \$96.00 (pp. 3756 to 3758). (The original of this deposit slip is marked "Plaintiffs' Exhibit No. 120" and is on file in the office of the clerk of this court.)

At that date when an entryman filed application to enter land under the timber and stone act, he was required to deposit in the land office \$8.00 for the publication of notice. That was the filing fee required (p. 3764).

William F. Kettenbach admits that the memoranda on both back and front of the slip are in his handwriting. The names on the back of the deposit slip in Kettenbach's handwriting are those of twelve of the entrymen who had filed the day before and were twelve of the aforesaid nineteen in the line-up, the other seven in the line-up being the relatives of Kester and Kettenbach before mentioned; and each one was required to pay into the land office the \$8.00 set out opposite his name.

Therefore, it appears that Dwyer had drawn the checks on the bank for the amount necessary for the twelve entrymen to pay their filing fees at the land office and had handed O'Keefe the filing fees for the entrymen forming his group, and that Dwyer paid the fees of the remaining entrymen personally, as is shown by the evidence recited herein in connection with their entries.

The explanations by Kettenbach and Dwyer relative to this matter are given at pages 3761 to 3771 of the record.

Mr. Kettenbach explains that it was merely incidental that, in making notation for the issuing of certificates of deposit for the register and receiver of the land office to be sent to publishers of newspapers for publication of entries made that day, he used the back of a deposit slip for that memorandum, and the following day he happened to pick up the same deposit slip and used it in crediting the account of Kittie E. Dwyer. There is no question that the money used by Dwyer was for Kester's and Kettenbach's transactions, and that Kettenbach was reimbursing Kittie E. Dwyer's account for the charge erroneously made to her account, instead of being held as a cash item and taken up by Kester and Kettenbach.

The explanation of Mr. Kettenbach is not persuasive, when you consider the transaction as a whole and the absolute improbability of the story. In the first place, Mr. Kettenbach, to substantiate his statement, produces the Certificate of Deposit Ledger of the Lewiston National Bank of the 25th of April, 1904, showing that two certificates of deposit were issued to two local newspapers in the sum of \$151.70 each (p. 3761). If the amount of either of the certificates of deposit had been in the amount of the notation on either side of the deposit slip, it might be considered in corroboration of his explanation.

The force of his explanation is lessened still further by the fact that Mr. Kettenbach did not issue any certificate of deposit on that date, but all certificates

that were issued that day are in the handwriting of Mr. Bradbury, the teller (pp. 3762 to 3765). Further, it is not at all probable that the receiver or register of the land office, desiring to purchase two certificates of deposit, each in the sum of \$151.70, would go to his banker and give the names of twelve persons whose publication fees were to be paid out of one or the other of said certificates, and it is much more improbable that the names mentioned should happen to be the particular twelve referred to. Besides, it is not explained why the amount furnished O'Keefe should be deducted; his entry had to be published just the same as the other entries.

The matter on the front of the deposit slip is so closely allied and related to that on the back, as not to admit of the explanation given, or of any other conclusion than that it is one and the same transaction. This, together with the other evidence on the subject mentioned in connection with each entry separately, is conclusive that Kester and Kettenbach paid the filing of said twelve entrymen.

SUMMARY OF EVIDENCE CONCERNING THE "O'KEEFE GROUP" AND THE "KESTER-KETTENBACH-DWYER GROUP" (THE LINE-UP.)

From the foregoing it appears that Kester and Kettenbach in one form or another, or by one device or another, furnished every entryman of the "O'Keefe group" and the "Kester-Kettenbach-Dwyer group" practically every dollar they used in connection with their entries. All of the entrymen, except Bingham, were taken to the land the preceding October by Dwyer. Kester furnished the money for McMillan and Greenburg

to make proof and also for filing (see deposit slip); and Dwyer furnished the money to Wilson (p. 3385), Frances Justice (p. 3384), and Fred Justice (p. 3400) with which to make proof and received the same from Kester for that purpose, and the filing fees were also furnished from the same source (see deposit slip). Fred Justice made proof July 13, 1904 (p. 1423), and conveyed his claim to Kester and Kettenbach the same day, the deed not being recorded until June, 1906 (p. 1704), no mortgage being given. All the proof we have is that Kester and Kettenbach furnished all the money to Fred Justice through Dwyer, and the latter did as his mother and Guy Wilson did—conveyed the claim the day he made proof.

The arrangements were made by Dwyer with Wilson and Mrs. Justice before going to view the land to furnish the money for all expenses and to purchase the land, Mrs. Justice making the arrangements for her son, and Kester promising the needed amount for McMillan before he entered the land.

The evidence mentioned in connection with each particular entry shows the arrangements or agreements upon which each of said persons entered his or her claim; the amount that each received for the claim; and the date of the conveyances to Kester and Kettenbach or Dwyer; and on the whole that said entries were made pursuant to antecedent agreements for the use and benefit of Kester, Kettenbach, and Dwyer.

Edna P. Kester, Elizabeth Kettenbach, Elizabeth White, William J. White, Mamie P. White, and Martha E. Hallett are the persons referred to by O'Keefe in his conversation with Taylor that were to be taken into

the timber, and they were taken to the timber in the fall of 1903, and Dwyer showed them over the land.

Mrs. Kester and Mrs. Hallett received the money from Kester with which to purchase their claims; Miss Kettenbach received all the money from Wm. F. Kettenbach for the purpose of initiating the entry, purchasing the claim, and paying the location fee, and Wm. J. White was permitted to overdraw his account at the Lewiston National Bank for the purchase of his wife's and his own claim.

Dwyer testified that he cruised said townships with a view of locating people on them, and that he picked out for those he took into said townships in the fall of 1903 the best claims that were available (pp. 3375 to 3381). In explaining, then, why those lands were not selected for the State when he was employed for that purpose in March of the following year, before the nineteen persons he had shown over the claims filed, Dwyer's testimony lacks candor and savors strongly of quibble and equivocation.

Dwyer testified to the effect that he showed the entrymen over all of the townships and that they would be equally as well satisfied with one quarter section as another. This, however, is at variance with the testimony of some of the entrymen; at least, the Taylors in their affidavit made for the defendants and introduced in evidence by them, shows that there was some particularity on their part as to the claims they were to enter, and Charles W. Taylor in his affidavit (defendants' Exhibit E, p. 4125) said: "In locating us he (Dwyer) would take us across and over the claims and would point out or select one member of the party

and say: 'This is yours,' and show the party his corners,' and E. J. Taylor in his affidavit, offered as defendants' Exhibit G (p. 4134), said that Dwyer told him: "Here is a good claim. I will locate you on that if you want it."

Dwyer says the entrymen when they got to the land office in April did not file on what was their first choice, but filed on the next best that was left (pp. 3380 to 3385). It would seem that from said affidavits the entrymen had but one choice.

Complainants' Exhibit No. 118 is a plat of Twp. 38 N., R. 5 E., and Exhibit 119 is a plat of Twp. 38 N., R. 6 E. The originals of both of said exhibits are on file in the office of the clerk of this court. On said plats are marked the lands selected by the State and also those of the said nineteen entrymen who filed the day after the State made its selection.

From reading the testimony, record pages 3032 to 3041, with said township plats before you, it will appear that the timber selected by the State in said townships cruised only from a million and a quarter to a million and a half or two million feet to the quarter section, while the claim of Jackson O'Keefe, being the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, sec. 23, T. 38 N., R. 5 E., cruised two and a half to three million feet of timber; the claim of Edna P. Kester, being the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, sec. 14, T. 38 N., R. 5 E., cruised two and a half million feet to the quarter (p. 3035); that the claims of J. W. Lane and T. G. Malone, being the S. $\frac{1}{2}$ sec. 7, T. 38, R. 6, cruised each three million feet to the quarter section; and the quarters in sections 18 and 19, T. 38, R. 6, cruised three million feet to a quarter section. The

last described claims are the Prentice, E. J. Taylor, M. E. Hallett, Frances A. Justice, E. Bliss, Dammarell, Sanders, and Caldwell claims (p. 3039). The claim of Charles W. Taylor, being the NW. $\frac{1}{4}$ sec. 30, T. 38, R. 6, cruised two million feet to the quarter section, and that the claim of Fred Justice, being the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, sec. 20, T. 38, R. 6, cruised two million feet to the quarter section (p. 3040).

Therefore, it will be seen that in carrying out the scheme of Kester, Kettenbach, and Dwyer to acquire Government timber lands in Twp. 38 N., R. 5, and Twp. 38 N., R. 6 E., in the fall of 1903, before said townships were opened to entry by the public and even before the plats of survey had been filed, Dwyer had taken the nineteen entrymen hereinbefore mentioned on the claims in said townships and said claims were entered the following spring on the day the land became open to entry by the persons thus shown the claims.

**KESTER AND KETTENBACH SECURE APPOINTMENT OF
DWYER TO ASSIST IN MAKING STATE SELECTION IN
SAID TOWNSHIPS.**

As has been stated before, on February 24, 1904, the plats of survey of T. 39 N., R. 5 and 6 E., T. 38 N., R. 5 and 6 E., T. 40 N., R. 5 E., B. M., were filed in the land office at Lewiston and under the law the State had a preference right of sixty days in which to make and file its selection, and said townships became open to entry by the public on April 25, 1904.

These are the townships upon which Dwyer had taken the nineteen persons forming the O'Keefe group and the Kester-Kettenbach-Dwyer group in the preceding October, and said persons filed, as aforesaid, the

day after said townships became open to entry by the public.

Robnett testified that in December, 1903, or January, 1904, in W. F. Kettenbach's office at the Lewiston National Bank, Kettenbach and Kester discussed the feasibility of having Goldsmith employ Dwyer to assist him in going over the timber and making the selection for the State (p. 2245) in said townships. Kester stated that if Dwyer should be so employed he could leave out of the State selection such claims as they (Kester and Kettenbach) desired to locate entrymen on (p. 2246). It was agreed that Kettenbach would discuss the plan with Goldsmith, Kettenbach assuring Kester that he could "arrange that." Several days later Goldsmith came to the bank and saw Kettenbach, and the latter suggested that he appoint Dwyer as one of the selectors for the State. Goldsmith stated that he did not know that he could make the appointment, as Dwyer was not a resident of the State of Idaho, but a resident of Washington; but that he would consider the matter. Shortly thereafter Goldsmith returned to the bank and told Kettenbach that he would employ Dwyer (pp. 2247-2248).

Goldsmith, Scott, Dwyer, and Lafferty went into the timber March 26, 1904, for the purpose of examining the timber for the State selection, and the same party returned from the timber to Lewiston April 18, 1904 (pp. 3669 to 3672).

Dwyer testified that he cruised and estimated Townships 38 N., R. 5 E., Twp. 38 N., R. 6 E., and Twp. 37 N., R. 6 E., with Mr. Goldsmith (p. 3370).

A day or two before the State made its selection, Goldsmith was again at the bank and Kettenbach gave him a list of claims furnished by Dwyer that he (Kettenbach) did not desire to be included in the State selection (pp. 2249 to 2252).

At the time Dwyer was assisting in making the State selections he was still associated with Kester and Kettenbach in the procurement and location of entry-men as hereinbefore stated, and for a week prior to the day the State made its selection Dwyer had in line at the land office, Jackson O'Keefe, Charles W. Taylor, Joseph H. Prentice, Edgar J. Taylor, Edgar H. Dammarell, George H. Kester, Guy L. Wilson, Edna P. Kester, Frances A. Justice, Fred E. Justice, Elizabeth Kettenbach, Elizabeth White, Wm. J. White, Mamie P. White, Martha E. Hallett, Daniel W. Greenburg, David S. Bingham, Hattie Rowland, and Wm. McMillan, all of whom he and O'Keefe had taken to view the timber the preceding October upon the terms and conditions herein stated, and the claims selected by Dwyer and O'Keefe to be located upon by the above-mentioned friends and relatives of Kester, Kettenbach, and O'Keefe for the benefit of Kester, Kettenbach, and Dwyer were superior in quality to the selections made in the same townships by Dwyer for the State (pp. 3044 to 3047), as hereinbefore shown.

During that period Norman Jackson was chief clerk of the State land board, and took some part in this selection. Lafferty was regularly employed by the State as a timber cruiser (pp. 1432, 1433, 3667, 3668).

Mr. Jackson left the matter as to what the State would select in said townships entirely to Goldsmith,

and the others herein mentioned worked under Goldsmith's supervision. Goldsmith furnished Jackson with a list of the lands the State should select, and the selection was made as suggested by Goldsmith by the list he furnished. The list of selections was filed the day before the land became open to entry (pp. 1432-1433).

**KESTER'S ATTEMPT TO INFLUENCE ACTION OF CHIEF
CLERK OF STATE LAND BOARD.**

Just before Jackson filed the State selection at the Lewiston land office he said he was approached by Kester at Lewiston. Kester invited Jackson to take a drive with him (p. 1436). Kester stated to Jackson that he had furnished Mr. Goldsmith with the plats of those townships, which were very valuable to Goldsmith and enabled him to make intelligent selections, and that he had given Goldsmith other valuable information relative to the timber in that locality, and that in consideration of that the State should not select certain timber in said townships, so that he (Kester) might scrip the same. He said that he had held the scrip for about a year and that he thought it would be in justice to him to give him an opportunity to place it, as he had benefited the State to so great an extent (p. 1435-1436).

The testimony of Robnett to the effect that Kester and Kettenbach, after discussing the matter between themselves, agreed to try to have Dwyer appointed to assist in making the State selections in order that the land they had contemplated acquiring in said townships would not be selected by the state, and to this

end sought Goldsmith and induced him to employ Dwyer for that purpose, although Dwyer was not a resident of the State of Idaho, is strongly corroborated by the concurrent circumstances, evidenced by the further fact that Kester endeavored to induce Mr. Jackson, clerk of the land board, not to select in said townships certain tracts of land that he (Kester) wanted, in consideration of services that Kester had rendered Mr. Goldsmith in these selections, in furnishing him plats of the townships which Kester explained were very valuable in enabling Goldsmith to make intelligent selections; and the significant fact that the state did not select the nineteen entries before referred to, though the timber upon said claims is greatly superior in quantity to the timber upon the quarter sections selected on behalf of the state.

DWYER CONTESTS.

The next link in the chain showing the determination of Kester, Kettenbach, and Dwyer to acquire Government timber lands in said two townships are the contests instituted by Dwyer and the circumstances surrounding the devolution of the title to the claims thus contested to Kester, Kettenbach, and Dwyer.

It was agreed between Kester, Kettenbach, and Dwyer, after said nineteen entrymen applied to enter and before any of them had made proof, that Dwyer should contest a number of homestead entries made in said townships, and should he prevail at the hearing, he would have persons he held in readiness for that purpose, apply to file upon said claims under the timber and stone act (pp. 2232 to 2235), and then convey the claims to them.

Pursuant to this arrangement, Dwyer in May, 1904, filed contests against sixteen homestead entries in said townships and said claims were subsequently entered under the timber and stone law, a number of them by the relatives of Kester and others by employees of Dwyer, and still others by persons procured by Dwyer to enter them under a prior agreement; and in all cases the lands so entered were later conveyed to Kester and Kettenbach or to the wife of Dwyer.

George W. Miller filed a homestead entry on a quarter section in sec. 24, T. 38, on February 24, 1904. Wm. Dwyer in May of the same year filed a contest against said entry and the case was closed by a relinquishment October 28, 1904. Later said claim was filed upon under the Timber Land Act by Mabel K. Atkinson, a sister of George H. Kester, and Mrs. Atkinson conveyed the title to said claim to Wm. F. Kettenbach and George H. Kester in May, 1906 (pp. 1441-1442).

Charles F. Shumaker filed a homestead entry in sec. 29, T. 38, October 29, 1903. Wm. Dwyer filed a contest against the same the following May and the contest case was closed by a relinquishment September 6, 1905. On the same day Jos. F. Atkinson, brother-in-law of George H. Kester, entered said claim under the timber and stone act and after final proof conveyed said claim to Wm. F. Kettenbach and George H. Kester (pp. 1442-1443).

Charles B. Thornberg filed a homestead entry in sec. 29, T. 38, February 24, 1904. Said claim was contested by Wm. Dwyer May 25, 1904, and a relinquishment obtained, and later Charles S. Myers entered said claim under the timber act upon prior agreement, and after

making proof conveyed the title to said claim to Wm. F. Kettenbach and George H. Kester March 21, 1906 (pp. 1443-1444). (Myers is one of the Steffey group.)

On February 24, 1904, Charles G. Vogelmann filed a homestead entry in sec. 7, T. 39. Wm. Dwyer contested this entry May 25, 1904, and said contest case was closed by a relinquishment in November, 1905, and Frank L. Moore made a timber and stone filing on said claim (p. 1445).

Wm. B. Walker filed a homestead entry April 6, 1904, for a quarter section of sec. 20, T. 38. A contest was filed against said entry May 25, 1904, by Wm. Dwyer and the contest case was closed by a relinquishment, and Hiram F. Lewis made a timber and stone entry of said claim under a prior agreement and later conveyed title of said entry to George H. Kester and Wm. F. Kettenbach (p. 1446).

Walter Williams filed a homestead entry on a quarter of sec. 15, T. 38. A contest was filed against this entry by Wm. Dwyer May 25, 1904. The contest was closed by a relinquishment of the entry. On August 23, 1904, the date of the relinquishment, Charles Carey made a timber and stone filing on said claim under a prior agreement, and in April, 1905, conveyed title to the same to Wm. F. Kettenbach and George H. Kester (p. 1447).

Albert J. Flood made homestead filing in sec. 15, T. 38, in February, 1904. Wm. Dwyer contested said entry May 25, 1904. The contest case was closed by a relinquishment of the entry July 11, 1904. On the same day Albert G. Kester, brother of George H. Kester, entered said claim under the timber and stone act

and later conveyed the title to said claim to Wm. F. Kettenbach and George H. Kester. The said deed was recorded at the request of Wm. Dwyer (p. 1448).

John P. Harlan entered a quarter section of land of sec. 28, T. 40, under the homestead law. Wm. Dwyer filed a contest against the same October 4, 1904. The contest was later dismissed by the Secretary of the Interior (p. 1449).

Wm. R. Lawrence made homestead filing on a quarter of sec. 15, T. 38. This entry was contested by Wm. Dwyer May 25, 1904, and the case was closed by a relinquishment July 11, 1904. On the same day Benjamin F. Rowland, husband of Hattie Rowland, of the "Line-up," entered said claim under the timber and stone act and later conveyed the title to said claim to Kittie E. Dwyer (p. 1450).

On February 24, 1904, Fred H. McConnell made homestead filing on a quarter of sec. 30, T. 38. Wm. Dwyer filed a contest against said entry in May, 1904, and the case was closed by a relinquishment August 5, 1904. On the same day Malvern C. Scott, who assisted Goldsmith and Dwyer in cruising for the State selections, entered said claim under the timber land law, and on February 5, 1906, conveyed the title to said claim to Wm. F. Kettenbach and George H. Kester (p. 1451).

Frank A. McConnell made homestead filing on a quarter of sec. 20, T. 38, February 24, 1904. This claim was contested by Wm. Dwyer and the case closed by a relinquishment December 12, 1904. Margaret A. Miller on the same day entered said claim under the timber and stone act and later conveyed title to the

claim to Kittie E. Dwyer, the deed being recorded at the request of Wm. Dwyer, her husband (p. 1452).

On February 24, 1904, Albert Anderson made homestead filing in sec. 30, T. 38. This claim was also contested by Wm. Dwyer, May 25, 1904. The contest was closed by a relinquishment, December 12, 1904. Mary E. Sherman on the same day made a timber and stone filing on the same claim and later conveyed the title to the same to Kittie E. Dwyer (p. 1453).

George G. James entered land in sec. 8 and 9, T. 38, under the homestead law, February 24, 1904. Wm. Dwyer filed a contest against this claim and the contest was closed by a relinquishment September 21, 1904. On the same day George C. Davenport made timber and stone filing on said claim and later conveyed the title to the same to Wm. F. Kettenbach and George H. Kester (p. 1454).

John McHardie on April 18, 1904, filed a homestead entry on a quarter of sec. 19, T. 38. Wm. Dwyer filed a contest against said entry in May, 1904. The contest case was closed by a relinquishment of the entry September 8, 1904. On the same day Edwin Bliss, an employee of Dwyer (p. 3306), and who also assisted Dwyer and Goldsmith in cruising for the State selections, entered said claim under the timber and stone act and later conveyed title to the claim to Wm. F. Kettenbach and George H. Kester (p. 1455).

Carl Rogers made homestead filing for NE. $\frac{1}{4}$, sec. 12, T. 38, R. 5 E., B. M. Rogers later relinquished this claim and filed on the same under the timber and stone act. This latter filing was contested by Wm. Dwyer May 4, 1906. The contest was closed by a

relinquishment March 14, 1908. On the same day some Northern Pacific scrip was filed on said claim, the nonmineral affidavit being executed by Wm. Dwyer (p. 1457).

On February 24, 1904, L. Grace Rogers made a homestead entry in sec. 12, T. 38. This she relinquished and filed upon said claim under the timber and stone law. Contest was filed against this entry by Wm. Dwyer, and the receiver and register of the land office held in favor of the contestant. The papers in the case were transmitted to the General Land Office, and no further action has been taken upon them. Northern Pacific scrip was filed on this entry, and Wm. Dwyer made the nonmineral affidavit. Later a half interest in said claim and the one last preceding, was conveyed to Wm. F. Kettenbach, and a quarter interest was conveyed to George H. Kester, said deed being recorded at the request of Wm. Dwyer (p. 1457).

Susan Comstock made a homestead filing May 25, 1904, in sec. 29, T. 39, R. 5 E., B. M. Wm. Dwyer filed a contest against said claim May 25, 1904, and the contest case was closed by a relinquishment October 26, 1904. On the same day Edward M. Lewis entered a portion of said claim under the timber and stone act, upon a prior agreement, and Wm. E. Helkenberg entered the remainder of the claim under the timber and stone act on the same day. The property so entered by Lewis and Helkenberg was later conveyed to George H. Kester and Wm. F. Kettenbach (p. 1459).

THE HIRAM F. LEWIS ENTRY.

Hiram F. Lewis, who has resided at Lewiston for about nine years and who made entry under the

timber and stone law of the homestead claim of Wm. B. Walker which was relinquished after a contest by Dwyer, had testified at two criminal trials relative to the manner in which he had taken up said claim and had also made an affidavit before a special agent of the land office concerning the same. At the trial of Wm. Dwyer in the fall of 1906 on the charge of subornation of perjury, and also at the trial in the spring of 1907 of Wm. F. Kettenbach, George H. Kester and Wm. Dwyer charged with conspiracy to defraud the Government of timber lands, Lewis testified that Dwyer suggested to him the advantage of making a timber land entry; that prior to making the entry Dwyer agreed to give him \$150.00 for his right at the time the claim was turned over to them; and that he received \$150.00 from Kester pursuant to said agreement. He made practically the same statements in the affidavit in 1905. He also testified that the statements made in his sworn statement were untrue and that he knew they were untrue at the time of making the statement (pp. 901 to 1055). At the present trial he testifies that Dwyer told him that they had some good timber claims and if he wanted to take one of them he could make a little money out of it (p. 905). He obtained a relinquishment from Dwyer before entering the claim and filed the same at the land office at the time he made application to enter (p. 927). He now says that Dwyer didn't say he would give him \$150.00 because he got \$250.00 (pp. 905 to 915), and that he received \$250.00 from Kester (p. 917). He got \$200.00 from George H. Kester with which to make proof. He made the arrangements with Kester himself. He

met Dwyer and Kester together on the street one day and they talked about this claim. He thinks it was after he had entered it (pp. 927 to 929). With part of the money Lewis received from Kester he paid his filing fees (pp. 946-947). Dwyer gave him a copy of the final proof papers to read before he made proof (p. 933). Dwyer asked Lewis if he had a brother and said he had another relinquishment of a claim that the brother could get. Hiram Lewis procured his brother Edward M. Lewis to enter a timber claim, to which Dwyer furnished the relinquishment (p. 932). A contest was filed against the entry made by Edward M. Lewis. The expense of this contest was paid by Hiram Lewis and he was reimbursed for the amount thus expended by Kester (p. 937). Hiram Lewis got most of the money from the Lewiston National Bank for the expenses of his brother in taking up his claim (p. 956). Both claims were conveyed to Kester; \$150.00 was received for Edward M. Lewis's claim over and above expenses for his own claim (p. 957). (Pp. 901 to 1003, Lewis's testimony.)

THE EDWARD M. LEWIS ENTRY.

Edward M. Lewis made a timberland entry October 26, 1904 (p. 2042), on the homestead claim of Susan Comstock that had been contested by Dwyer and relinquished. His brother, Hiram F. Lewis, told him he had a chance to take up this claim and that he was to go to the timber with Dwyer. He did not have the money with which to enter this claim, but Hiram told him to leave it to him and that it would be all right (pp. 2444-2445). Two days after this conversation he,

in company with Dwyer, started for the timber. They were three days on this excursion, all the expenses of which were paid by Dwyer. Several days after his return from the timber Edward, at the direction of Hiram, went to the law office of one Mullen, where his filing papers were prepared. Mullen had a description of the land (pp. 2045-2046); he did not pay Mullen a fee for preparing said papers; and Dwyer named the witnesses for final proof. Before filing, Hiram F. Lewis told him he would see that he got the money with which to take up the claim (p. 2046). He received the money with which to pay the filing fee at the land office just before filing from Dwyer (p. 2055). He did not pay anything for the relinquishment, nor did he pay a location fee. His brother gave him a check with which to obtain the money for final proof, and he did not use a dollar of his own money in the transaction; nor did he give a note for the money furnished him (p. 2047); nor did he pay any interest on said money; and nothing was said about returning it (p. 2048). After proof a contest was filed on forty acres of this claim, and Dwyer advised Edward Lewis to retain Mullen to defend the case, and stated that he thought the fee would be about \$30.00. Following Dwyer's advice, he retained Mullen and paid him \$30.00. He told his brother of this expenditure, who said it would be returned to him, and he was later reimbursed for that amount as hereinbefore stated (pp. 2048, 2049, 2051, 2059, 2060). Hiram F. Lewis told Edward that he (Edward) did not own the claim and had no right to sell it, but that "it belonged to these other parties and Dwyer" (pp. 2050, 2051, 2056). Edward afterwards deeded the

property to Hiram (p. 2050), who turned same over to Kester, Kettenbach, and Dwyer. Edward received \$125.00 out of the claim (p. 2051). At the trial of the criminal cases Edward and Hiram Lewis agreed that they would stand together and give no more information than they had to. Hiram told Edward not to tell anything that would get him into trouble (p. 2066).

THE CAREY ENTRY.

Walter Williams, who resides at Oakdale, Wash., made the homestead filing in the Lewiston land office in February, 1904, hereinbefore referred to. He and Albert Flood were notified that contests had been filed against their claims. They went to the land office to inquire into the matter, and were there referred to Wm. Dwyer. Dwyer told them that they couldn't prove up on the land, and that as it would cost him \$50.00 to contest the claims, he was willing to give them that amount of money if they would relinquish the claims. After discussing the matter, Williams and Flood concluded that it would be best to accept Dwyer's offer, and the same day they made out their relinquishments at the Lewiston National Bank. Dwyer and Wm. F. Kettenbach were present at the time and Kettenbach said, as Dwyer had, that they would not lose their right to make another homestead filing. Later they sent to Williams through the mail a check for \$50.00 (pp. 1023 to 1028).

Charles Carey, in August, 1904, was conducting a shooting gallery and cigar store at Lewiston, and later was employed by a butcher. Carey wanted to get a timber claim. He asked "Scotty" (Malvern C. Scott)

if he could find him a claim. Later Scotty told him that he knew where he could get a claim and he thought that Carey would be able to get \$150.00 out of it. Scotty introduced him to Dwyer, saying that "he (Carey) is a good boy; he is an all right fellow,—and told how long he had known me and different things." Dwyer said he could locate him, but that he didn't think that there would be over \$125.00 in it for him. Dwyer said, "The least said about it the better; I had better keep it to myself." Scotty told Carey he thought Dwyer would furnish him the money with which to take up the claim. Dwyer did not take him to the claim. Carey had been in that locality on a fishing trip at one time, and was pretty sure he had been on the land (pp. 551 to 555). Dwyer gave Carey the relinquishment that he had received from Williams, and Carey entered the land thus relinquished under the timber and stone act. Carey did not pay anything for the relinquishment, nor was he requested to pay for it (p. 556). Dwyer prepared his filing papers and gave him the money with which to pay the expenses incident to filing. He understood from Scotty that Dwyer would furnish all the money that was needed. Dwyer did give him the money, but did not inquire whether it was needed or not (pp. 556 to 558). The day before final proof Dwyer gave Carey \$400.00 for that purpose. At Dwyer's suggestion, he purchased a certificate of deposit with the money, as Dwyer said it would look better. Dwyer discussed with Carey the propriety of the latter swearing that he did not purchase the land on speculation, etc., but he does not remember whether it was in regard to the sworn statement or final proof.

He does remember, however, that Dwyer said, "You are taking it up for your own benefit. If you can sell it you will get something for yourself." Dwyer gave him a set of the final proof papers to take home with him. and told him that Scotty would inform him as to answers to the questions about which he was not sure. Dwyer told him there was nothing wrong about it, that he was taking it up for his own benefit (pp. 559 to 562). He made final proof with the \$400.00 that Dwyer had given him, and swore that it was his own money (pp. 562 to 563); said that he earned the same in his business and had had it for twelve years (p. 563). Immediately before making proof, Dwyer gave Carey \$150.00, and immediately after proof he handed that amount back to Dwyer, who gave him a receipt for it as a location fee (p. 565), and immediately after that, "Well, we went to the California Wine House, and he (Dwyer) gave me \$125.00." Q. Now, what did he give you that for? A. Well, that was for—he said when I took up the claim; he said I could get that much out of it if I wanted to sell it. Q. And that was carrying out his part of the agreement, was it? A. Well, yes; I think so, as I understand it (p. 566). * * * Q. What did you consider that \$125.00 was for that he gave you at the wine house? A. I considered I took up his proposition of \$125.00. That was ten minutes after he made proof (pp. 568 to 569). When Carey first talked to Scotty, he understood that he was to get \$150.00 for his right (p. 570). In going over the questions with Dwyer before final proof, Dwyer said, "You haven't any agreement to sell" (p. 576). Immediately after making proof he went to the office of one Ketten-

bach and signed and acknowledged a printed paper before Kettenbach. He doesn't know whether it was a deed or not. A few minutes thereafter he was given the \$125.00, and that is all the money he got out of his claim (pp. 567 to 568).

Albert J. Flood gives practically the same testimony relative to the relinquishment, as did Williams, and understood that the same was to be held in escrow until they had got a filing on the land (pp. 1003 to 1009). Kester's brother then entered claim under the timber and stone act, and conveyed to Kester and Kettenbach (p. 1450).

THE STEFFEY GROUP.

AGREEMENT BETWEEN STEFFEY AND DWYER AND KNOWLEDGE THEREOF BY KESTER AND KETTENBACH.

In the fall of 1905 Harvey J. Steffey, a timber cruiser and locator, living at Pierce, Idaho, who had been interested in one or two timber claims with Dwyer and Kester and had been employed by and worked in the woods with Dwyer (pp. 1745 to 1751), entered into an agreement with Dwyer that Steffey would procure a number of persons to enter timber claims upon agreements between Steffey and the persons so to be secured, to be made prior to the initiation of the entries, that Steffey would locate said persons on timber claims, pay their filing fees and furnish them with the money to pay for the land and all incidental expenses, and that said persons would after proof convey the claims thus entered to Kester and Kettenbach and be paid by Steffey \$150 to \$200 each for their services. Steffey was to check upon the Lewiston National Bank for the money necessary to carry out this agreement, whether

or not he had sufficient funds in that institution to meet said checks, and Dwyer assured him that the checks would be honored. At that time Steffey knew that Kester, Kettenbach, and Dwyer were "working together in timber claims" (pp. 1751 to 1755, 1758, 1772-1773, 1750-1751, 1803). Dwyer told Steffey that he (Dwyer) was to get a third interest in the land so located after title to the same was acquired, and the other two-third interest was to go to Kester and Kettenbach (pp. 1802 to 1804); and that he (Steffey) would be (treated) all right—he would get his share (p. 1772). Kester also told Steffey that he would see that he received what was due him and that he need have no fears whatever (p. 1803). Kester further advised Steffey to leave the matter to him and he would get what he claimed, and requested him not to make any trouble about it (p. 1856).

Pursuant to this agreement with Dwyer, Steffey procured the following-named persons to enter timber claims: Charles S. Myers, Jannie Myers, Mary A. Loney, Charles A. Loney, James T. Jolly, Effie A. Jolly, Clinton E. Perkins, and Frank J. Bonney. Each of said men had married sisters of Mrs. Myers, and at the time their entries were made Steffey was boarding at the home of another sister of Mrs. Myers, a Mrs. Gaffney.

These claims are known as the Steffey entries. Said claims were entered pursuant to an agreement between Steffey and said named persons that Steffey would locate them on timber claims, furnish them with the money to make their applications to file and to pay for the claims, and all expenses in connection there-

with, and that after final proof said entrymen and entrywoman were to convey the claims so filed upon and entered to whomsoever Steffey would designate, and that Steffey would pay them \$200 apiece (1771, 1870-1871). These agreements were made before said persons so procured had made applications to file on the land or taken any steps whatever to initiate the entries. Under said agreements Steffey located said persons on timber claims, paid their expenses to and from the land and their expenses from their homes to the land office at Lewiston and return, both when they filed and when they made proof and purchased the land. Steffey also paid their filing fees and the expense of publication, and gave each of them the amount of money necessary to pay for the land. After final proof said persons conveyed the title to the land they had acquired to Kester and Kettenbach and Steffey paid them \$200 apiece, except one who entered an eighty-acre claim, and to that Steffey paid \$175. The money expended by Steffey in securing said claims was obtained from the Lewiston National Bank on his check, and in many instances there was not a sufficient credit balance in the account to cover the amount of the checks (pp. 1777-1778). Before any applications had been made to file on any of these claims, Steffey had discussed with Dwyer the character of the claims and the conditions upon which the proposed entrymen would take up the claims. As to one of said claims, which they intended to secure through a proposed entryman whom Steffey said he could procure to enter the same for \$100 or \$150, Dwyer said he could get a number of persons to enter that claim for \$100, the

claim referred to being a homestead entry of Thornberg that Dwyer had contested, as hereinbefore mentioned. This claim was later entered by Myers. Steffey and Dwyer had gone over a number of these claims together before filings were made thereon and others they had examined before the money was furnished the entrymen to make proof and pay for the land (pp. 1772 to 1775, 1783, 1790 to 1793, 1800 to 1803, 1752). The advisability of locating Entrymen Loney and Jolly on two of said claims was discussed at the bank between Steffey and Dwyer in the presence of Kester, and when it was decided that they would secure those claims by locating Loney and Jolly upon them Kester was much pleased at the prospect of obtaining two such good claims and agreed that it was advantageous to get claims of that quality. Steffey said: "I had looked up the claims, and came down to Lewiston to meet Mr. Dwyer, and told him I had two exceptionally good claims, and that I had some people to put on them, and he said 'All right,' and he asked me about the claims, and I told him that one of them was exceptionally good, I thought; and we went into the bank, and he told Mr. Kester about the matter, and I compared it to another claim called the Dellmarie, (this is the Carrie D. Maris claim referred to as one of the Robnett group) and told him one of them was better than that, and he asked me if I had anybody to put on them, and I told him I had, and he said if it was better than the Dellmarie claim that we would have a champagne supper. Q. That was Mr. George H. Kester said that? A. No; it was Mr. Dwyer that said that. Mr. Kester was inside of the railing of the

bank. Q. Well, did I understand that the discussion as to the comparative merits of these two claims was discussed with Mr. Kester? A. Right before Mr. Kester, yes. Q. And this Dellmarie claim that you refer to, is that the Carrie D. Maris claim? A. That is the one; yes" (pp. 1783-1784). This discussion was before the entrymen had filed (1783, 1790, 1850 to 1854).

On one occasion when Dwyer was out of town Steffey went to see Kettenbach to arrange for money for two of said entrymen to make proof. He asked Kettenbach where he was to get the money for that purpose and also talked with him about his overdrafts. Kettenbach stated that he would arrange to have the money for final proof for the two entrymen at the Idaho Trust Company. This arrangement, however, was not made, and later Kettenbach told Steffey to draw his check upon the bank for the money needed (pp. 1807-1808). The two entrymen were with Steffey when he drew the money for their proof, and Kettenbach was familiar with everything he was doing and knew what he wanted the money for (pp. 1807-1808). The paying teller of the bank was given a general authorization by Kester to pay Steffey's checks when his account was overdrawn. When Steffey's overdrafts aggregated several thousand dollars, the matter was submitted to Kester for his O. K., and on several occasions the teller did call Kester's attention to Steffey's overdrafts (p. 2781). On one occasion Kester directed the bookkeeper to honor all of Steffey's checks. He said that if Steffey overdrew his account it was all right as Steffey was up in the timber cruising and locating for them and at times was buying timber for them (Kester and

Kettenbach) (p. 2329). Steffey didn't charge any of said persons that he located a location fee and he was not paid a location fee, nor was a fee for location included in the expenses (p. 1773). Steffey told said entrymen that he didn't have an agreement with them, in order that he might protect himself, Kester, Kettenbach, and Dwyer as much as possible (pp. 1759, 1866, 1867). As has been stated, all the money used by Steffey for the entrymen to file and perfect said entries was drawn from the Lewiston National Bank on Steffey's individual check, whether he had a credit balance or not. The balance of the \$200 due to each entryman was paid in the same way at the dates of the transfers of the claims from the entrymen to Kester and Kettenbach.

In the testimony of Steffey, on cross-examination, occurs the following:

Q. What did he (Kettenbach) pay you for them (the claims)?

A. He didn't pay me anything for them.

Q. What did he pay for the claims?

A. He paid these people \$200; they all got the \$200.

Q. You had already paid that according to your testimony.

A. No; I hadn't already paid that.

Q. Well, it was charged to your account, wasn't it?

A. Well, I don't know whether it was or not.

Q. You had given your checks for it?

A. Well, I had given my checks; yes.

Q. And they were paid—the checks were paid—and they were returned to you, charging

the same as any other checks you drew on the bank, were they not?

A. Yes, sir (p. 1827).

Q. Then they must have been charged up to your account, were they not?

A. Well, this money wasn't paid finally until the land was deeded over to Kester and Kettenbach. * * *

Q. Well, now, then, how did you get your money back; how was your settlement made?

A. I didn't get my money back.

Q. How was your settlement made?

A. The settlement was made when the—I don't know how they did make the settlement. I never paid any attention to my checks afterwards. I supposed they straightened those things up themselves (p. 1827).

So in the fall of 1905 Harvey J. Steffey engaged in the timber business with Dwyer, Kester, and Kettenbach, and for the funds with which to pay the expenses incident to initiating the entries before mentioned and furnishing the entrymen the amount of money for final proof, Steffey, on different occasions, acting upon the instructions of Kester, Kettenbach, and Dwyer, drew his checks upon the Lewiston National Bank when there was not a sufficient credit balance in his account to pay the same. The payment of these checks created overdrafts in the account, and from time to time Steffey gave notes, to cover the overdraft, which were returned to him after the entrymen, who had been located, had conveyed the claims to Kester and Kettenbach. Steffey did not pay these notes, but they were afterwards taken up by Kester and Kettenbach.

The following is a description of the aforementioned notes given by Steffey in renewal of notes given to cover said overdrafts:

Number.	Date.	Time.	Interest.	Amount.	Page.
			<i>Per cent.</i>		
15888	Dec. 29, 1906	Demand.....	10	\$1,311.00	3753
15937	Jan. 17, 1907	Demand.....	10	1,000.00	3754
16051	Apr. 2, 1907	Demand.....	10	350.00	3754
16055	Apr. 4, 1907	6 months.....	10	700.00	3754
16197	July 6, 1907	3 months.....	10	300.00	3755
				3,661.00	

The aggregate of these five notes is \$3,661, and the interest computed upon them December 28, 1907, amounted to \$318. The total amount of the notes and interest is \$3,979 (p. 3755). On December 28, 1907, each of these said notes was paid at the bank, and the total amount charged to the land account of Kester and Kettenbach (pp. 3757, 3755). This explains how Steffey's settlement with the bank was made, and also explains why in reply to that inquiry he gave the not wholly intelligible and apparently evasive answer, "The settlement was made when the—— I never paid any attention to my checks afterwards. I supposed they straightened those things up themselves." The fact is he knew nothing about the account, and they straightened it up to suit themselves.

THE CHARLES S. MYERS ENTRY.

Charles S. Myers, husband of Janie Myers, entered a timber claim October 30, 1905 (p. 603). This is the Thornberg claim that Dwyer had contested, but Myers does not know how the relinquishment was

obtained (pp. 604, 1443, 1444). At that time he had resided at Fraser, Idaho, for 14 years. Myers told Steffey he would not mind taking up a claim, but that he didn't have any money. Steffey told him he could get him a claim,—that it wasn't a very good one, but that he could make \$150 out of it. Steffey said he would let him have the money to enter the claim and to pay all his expenses (p. 605). Steffey gave him \$20 to pay his expenses to Lewiston and return and to pay his filing fees at the land office (pp. 605, 606). The original agreement between Steffey and Myers before the latter filed was that Steffey was to let him have the money to purchase the land, and, in compliance with this agreement, Steffey met Myers at Lewiston the day Myers was to make proof and gave him something over \$400.00, and that is the money with which Myers made proof immediately thereafter (p. 608). Myers made proof January 22, 1906 (p. 604). He executed a deed conveying title to said claim to Kester and Kettenbach, March 12, 1906 (pp. 614, 618), and Steffey then gave him \$150.00 (p. 613). The whole transaction turned out just as Myers understood it would from the arrangement he had with Steffey when they first talked of taking up a claim (p. 613). Myers would not have sold the claim to any one else without giving Steffey a chance to buy it. He felt under obligations to Steffey and that he had a prior right (pp. 613, 614). Steffey says that before Myers filed and before he took him to the claim, he told Myers he would give him \$150.00 if he would enter a claim and convey it to whomsoever he would designate; that Myers agreed to this and Steffey then furnished him the money for his

expenses to Lewiston and the filing fee. (Steffey paid for publication personally) (pp. 1756, 1757); gave him the money with which to purchase the land (p. 1758); and had Myers execute the deed to Kester and Kettenbach and gave him \$150.00 in accordance with the agreement he had with him before he entered the claim (p. 1760).

THE JANNIE MYERS ENTRY.

Jannie Myers, wife of Charles S. Myers, made a timberland entry March 19, 1906 (pp. 620, 624). She testified that Steffey was at her home one day four or five months before she filed, and they talked about taking up a claim, and she asked him if he could get her one. She did not have any money with which to purchase a claim. The matter was discussed at home, however, as to the way by which her husband had gotten his claim, and the arrangements he had with Steffey, and she wanted to get a claim in the same way (pp. 621, 622). Steffey accompanied her to Lewiston and to the land office when she filed (p. 623). At the date for final proof, Steffey again went to Lewiston with Mrs. Myers. She does not know who paid the expenses of this trip, but thinks her husband had an understanding with Steffey that Steffey was to pay all the expenses and furnish the money to take up the claim, and it was her understanding that she was to take up a claim under the same conditions her husband did (pp. 625, 626). She made proof June 6, 1906 (p. 624), and paid \$200 in the land office at that time. "Q. Where did you get that money? A. Well, I don't remember now where I did get it; I think I had part of it myself. Q. Whom did you get the rest from? A.

I think from Mr. Steffey.” She did not give Steffey a note for the money furnished, nor did she pay any interest. She signed a deed dated July 11, 1906 (pp. 627, 630), presented to her by Steffey and Dwyer, conveying the claim to Kester and Kettenbach (p. 628). Shortly afterwards, Steffey paid her \$125.00. “Q. And is that what you understood he was to give you when you entered the claim? A. Well, there wasn’t any understanding just how much I was to get. Q. Was it approximate how much you would get? A. He thought about that—that I could get” (p. 629). The entire transaction turned out just as she understood it would at the time she had her first talk with Steffey about the claim (p. 630). Steffey testified that he had an arrangement with Jannie Myers that he was to locate her on a timber claim, pay all of her expenses, and she was to convey the claim to whomsoever he told her, and he guaranteed that she would make \$150.00 (pp. 1762, 1761). Steffey had a Mr. Gaffney locate Mrs. Myers; Steffey gave her \$10 to pay the expenses from home to Lewiston when she filed (p. 1763); he had her filing papers prepared and paid the fee for the same (p. 1763). When Mrs. Myers went to Lewiston to make proof, Steffey again met her, and gave her \$250.00 with which to make proof and to pay for the land (the claim was 80 acres) (p. 1765). Steffey had her execute a deed for the claim to Kester and Kettenbach, and afterwards he paid her the balance of the money for her claim, making \$150.00 in all (p. 1766).

As to this entry (and the other entries forming the Steffey group), the court said: “I am convinced by the circumstances of the case and the admitted conduct

of the parties that they all made the entries with the understanding both upon their part and upon the part of Steffey that, upon issuance of final certificate, for a definite consideration, they should convey the land to anyone whom Steffey might designate" (p. 350). The court held, however, that Kester and Kettenbach, in purchasing the titles from the entrymen, acquired the same as innocent purchasers.

THE MARY A. LONEY ENTRY.

Mary A. Loney, who made a timber and stone filing March 23, 1906 (p. 2724), is the wife of Charles E. Loney and sister of Effie A. Jolly, Janie Myers, and a sister-in-law of Clinton E. Perkins (p. 2717). She testified that at the time she talked with Steffey about taking up a claim she did not have the money with which to purchase one, nor did she know where she was to get the money. Charles Myers had explained to her the manner in which he had taken up his timber claim, and about the time that she went to view the claim Steffey told her and Mrs. Jolly that he would get the money for them and about what they would get out of their claims. He told them they would get between \$200 and \$250 (p. 2721). At the first conversation she had with Steffey, he said he couldn't make an agreement to buy the land (p. 2722). She does not know what brought about this conversation, as she never asked him to make an absolute agreement. She thinks she had heard that Steffey and Dwyer were in the locating business together. Mrs. Jolly and Mrs. Loney went to view the land together, and later they went to Lewiston with Steffey and filed on the claims (p. 2723). Steffey

furnished most of the money to pay the expenses of Mrs. Jolly and Mrs. Loney to Lewiston when they filed. At Lewiston Steffey gave them the money for filing fees before they filed (p. 2724). Steffey went to the land office with them and either paid the filing fees or gave the money to them for that purpose (p. 2725). Before Mrs. Loney went to Lewiston to file, Steffey told her he would furnish the money for all the expenses and would furnish the money for final proof. Mrs. Jolly and Mrs. Loney again went to Lewiston together to make their final proof. They met Steffey at the land office. Steffey gave Mrs. Loney \$400 or \$450 with which to make proof. She thinks at that time he also gave her the money to pay her expenses incurred in going to Lewiston. She thinks he also gave her the money for Mrs. Jolly at the same time. Mrs. Loney made proof with the money Steffey had given her. She did not give him a note for the money he had furnished, nor did she pay any interest (pp. 2726, 2727). Mrs. Loney made proof December 3, 1906 (p. 2736). She executed a deed conveying the title to her claim to Kester and Kettenbach, February 28, 1907 (p. 2737). She never returned to Steffey the money he had furnished her and he never asked her for it. She had received various amounts of money from Steffey between the time she made the proof and the time she signed the deed. Mrs. Loney received about \$225 from Steffey for the claim. After the first conversation, in which Steffey said she would get \$200 out of the claim, she does not know that there was anything said relative to the amount she was to get (pp. 2730, 2731). And when the sum Steffey had given her amounted to over \$200, she considered that

she had conformed to her part of the arrangement and that he had completed his. The whole transaction turned out as she expected it would from the first time she had talked with Steffey relative to taking up the claim. She had heard Mr. and Mrs. Myers say they had sold their claims to Steffey (pp. 2731, 2732). When she went to view the land, she had in mind that Steffey would tell her to whom she was to convey her claim (p. 2733). She thought that either Steffey or some one he represented would get the land (p. 2733). If she hadn't intended to convey the land to Steffey, or to some one whom he represented, she would not have taken it up; she could not have made the entry (p. 2735). It was only the arrangement that she had with Steffey that made it possible for her to take up the timber claim (pp. 2735, 2736).

THE EFFIE A. JOLLY ENTRY.

Effie A. Jolly, wife of James T. Jolly, sister of Jannie Myers, sister of Mary A. Loney, and sister-in-law of Clinton E. Perkins, made a timberland entry March 23, 1906. At that time she resided at Fraser, Idaho (pp. 2689, 2690, 2706). She testified that at the time she and her husband took up the timber claims, neither of them had the money to pay for the claims, and Steffey knew their circumstances as well as they did (pp. 2691, 2692). They sent word to Steffey by Myers that they wanted him to get them a claim. Several weeks later Steffey showed them the claims. Steffey said he would pay all the expenses, which he did. He went to Lewiston with Mrs. Jolly and Mrs. Loney when they filed, and paid part of the expenses of that journey.

He gave the money to Mrs. Loney and out of that she gave Mrs. Jolly the money for her expenses (pp. 2692, 2693). There was nothing said as to what they would do with the claims, but that they had it in their minds what they would do with them. Mrs. Jolly supposed that Steffey would get her claim when he was ready for it. She knew that Steffey was dealing in timber claims (pp. 2693, 2694), and she expected that sooner or later he would get her claim, and that was one of the reasons that she entered the claim (pp. 2694, 2695). Steffey accompanied them to Lewiston and went to the land office with them when they filed. Steffey gave them the money to pay the filing fees before they filed. Steffey told them they would get \$200 apiece out of their claims (pp. 2697, 2698). That price was agreeable to Mrs. Jolly (p. 2699). On the day she made proof she met Steffey at Lewiston and he gave her \$412, and with that money she made proof and purchased the land. She didn't give him a note as evidence of that indebtedness, nor did she pay any interest on the money, and nothing was said about when the money was to be repaid (p. 2700). She executed a deed to Kester and Kettenbach February 28, 1907 (pp. 2700, 2706). The amount she was to get for the claim was not discussed at that time, nor was anything said about it between the time that she first talked with Steffey before filing and then (pp. 2700, 2701). She received the money Steffey was to give her and various amounts at different times, and after she made the deed, he sent her \$50, which was the balance due her (p. 2704). When she received this \$50, it was her understanding, that she had concluded her part of the agreement and Steffey

had concluded his. The whole matter turned out as she understood it would at the time she went to view the land (p. 2705). In all she was to receive just about \$200 from Steffey, over and above expenses (p. 2711). On recross-examination, Mrs Jolly testified as follows: "Q. And if anyone had sent the deed there to Mr. Todd, and they had the money to turn over for the land, you would have sold to him, would you not? You would have felt justified in signing the deed? A. Well, there was nothing said to that part, as to who we were to sell to, or anything about it; but I suppose we really felt under obligations to sell to them. Mr. Gordon: Q. To sell to who? A. Oh, to the Kettenbach and Kester, I suppose, that we did sell to. They located us. Mr. Tannahill: Q. Well, they had nothing to do with locating you, did they? A. No, sir. Q. And when he located you, Steffey never said anything about having any business relations with them, did he? A. No, sir, he didn't. Q. And the fact of the matter was that they had nothing to do with the locating of you on the land, or with furnishing you the money, so far as you know? A. Well, I couldn't tell about that—not that I know of" (pp. 2715, 2716). Mrs Jolly further said that she felt under obligations to Steffey to give him a preference right to buy the land (p. 2716).

Steffey said that Mary A. Loney and Effie A. Jolly had adjoining claims and were located together (pp. 1773, 1774). He guaranteed them \$200 above all expenses, and led them to think he would furnish all the money. Steffey paid the expenses of the trip of Mrs. Loney and Mrs. Jolly to the timber and also of

the trip they made to Lewiston to file. Steffey also paid the fee for preparing their filing papers, the filing fee, and for publication. Steffey accompanied them to Lewiston when they made final proof. He paid their railroad fare and all other expenses. On the day they made proof, Steffey gave them \$450 apiece for that purpose (pp. 1775, 1776). Steffey secured the deeds from Mrs. Loney and Mrs. Jolly conveying their claims to Kester and Kettenbach (p. 1778). At that time, he gave them the balance that was due them, between \$25 and \$50 apiece. The amounts he paid each of them would aggregate \$200 apiece. He did not talk to either of the entrywomen as to how much they were to get other than the first time that he broached that subject to them before entry, and when they executed the deeds, it was under the original arrangement he had with them, and nothing was said at that time as to how much they were to get (p. 1779). The procurement of Mrs. Loney and Mrs. Jolly to enter the claims, and the conveyance to Kester and Kettenbach, were in accordance with the original agreement Steffey had with Dwyer, and the conveyance by Mrs. Loney and Mrs. Jolly to Kester and Kettenbach, was the carrying out of the agreement they had with Steffey before they entered the claims (p. 1782). On December 4, 1906, Steffey gave Mrs. Jolly and Mrs. Loney each a check for \$50, said checks were paid December 18, 1906, and on February 28, 1907, the day that each executed the deed to Kester and Kettenbach, Steffey gave each of them a check for \$25 (pp. 1780, 1781, 1782.)

THE CHARLES E. LONEY ENTRY.

Charles E. Loney, entered a timber claim April 3, 1906 (p. 2751). He is a brother-in-law of Charles S. Myers. He testified that Myers told Loney that Steffey was locating him and his wife on timber claims and that he (Myers) had gotten the money to take up his claim through Steffey. Loney and Jolly went to view the claims together. At that time Steffey told them that he would furnish all the expenses, and he (Loney) supposed he was to get the money for final proof through Steffey (pp. 2746, 2747). Steffey took Loney to view the claim and paid his expenses to Lewiston when he filed. Steffey gave Loney \$10 and told him to divide that with Jolly for that purpose. Before he went to the land office the first time Steffey told him he would furnish him with money to make his final proof; that he wouldn't have taken the claim if Steffey had not told him that (p. 2748). Before he went to view the claim, he understood from Steffey that he and Jolly were to get between \$200 and \$250 each out of the claims. He got this understanding from Steffey. It was his understanding that the land was either to go to Steffey or to some one he represented. "There wasn't but very little said. I just drew an idea from what he said." He guessed it was the policy to say as little about it as possible (pp. 2748, 2749). Loney said that before he filed the Sworn Statement, he understood he was to turn the land over to some one. He didn't know whom at that time. He thought Steffey would be the man who would tell him to whom he should deed it. He understood that Steffey wanted the claim and didn't know whom it was for, but understood that he

would take it. That was what he had in mind when he went to look at the claim (pp. 2750, 2751). And he intended to convey after final proof to Steffey, or to whomever he represented, in consideration of the \$200. Steffey went to the land office with him when he filed (p. 2751). On the day of making proof, Steffey gave him \$450 for that purpose, and that was the money he paid into the land office in purchasing the land (pp. 2753, 2754). He did not give Steffey a note for the money furnished him, nor did he pay any interest on the same, and nothing was said as to when the money should be repaid (p. 2755). Loney made proof June 19, 1906 (p. 2752). Steffey presented to him a deed, dated July 12, 1906, conveying the claim to Kester and Kettenbach, which he executed (pp. 2756, 2761). Nothing was said at that time about the price of the land, and when he signed the deed, he was acting under the original arrangement had with Steffey. Before then, Steffey had given him \$75; he gave him the balance afterwards. The last payment was \$50 (pp. 2756, 2757). There was never anything said about the price of the land between the time he had his first talk with Steffey relative to the claim, and the time he received the last \$50 (p. 2757). The whole transaction turned out just as he expected it would from the time he had his first talk with Steffey. Loney said he carried out his part of the understanding and Steffey performed his part of it (p. 2760). Though Loney had received the money from Steffey with which to purchase the land a few moments before making proof, he swore at the land office that the money he used for that purpose he had received from the sale of property that he owned (p. 3978).

THE JAMES T. JOLLY ENTRY.

James T. Jolly entered a timber claim April 3, 1906. At that time he resided at Fraser, Idaho. Mrs. Loney, Mrs. Myers, and Mrs. Clinton E. Perkins, deceased, are sisters of Mrs. James T. Jolly (pp. 2656, 2657, 2662). Jolly said that before entering the claim he had talked with his brother-in-law, Charles Myers, about taking up a claim (p. 2658). And at that time knew that his wife and that Mr. and Mrs. Loney and Mr. and Mrs. Myers had taken up claims and had gotten the money from Steffey for that purpose. Steffey at that time was living at the home of another sister of Mrs. Jolly, named Mrs. Gaffney. When Jolly first talked with Steffey about taking up a timber claim, he knew that he could make the same arrangement with him as the others had, and that neither Jolly nor his wife had any money with which to enter claims (pp. 2685, 2686). Before entering the claim, Jolly understood that he was to get the money from Steffey for that purpose, and he expected to get about \$300 out of the claim. "Q. From whom did you expect to get that? A. Through Mr. Steffey—from him." Steffey located Jolly, and Jolly, Loney, and Steffey went to Lewiston together at the time Jolly and Loney made their applications to enter the land. Steffey gave Loney \$5 to pay Jolly's expenses to Lewiston (pp. 2660-2661). Steffey had their filing papers prepared and furnished them the money for filing the same. Later Jolly and Loney went to Lewiston to make proof (pp. 2663, 2664). On that occasion Steffey met Jolly and Loney and he gave Jolly the amount that he had expended in going to Lewis-

ton and \$400 with which to make proof. With that money Jolly made proof and purchased the land the same day. Steffey instructed Jolly to state at the land office that he had borrowed the money from him, but Jolly testified before the land office that the money was his own, that he earned it freighting and hard labor. Jolly made proof June 19, 1906, and executed a deed conveying title to his claim to Kester and Kettenbach July 11, 1906 (pp. 2664, 2665, 2673). Jolly thinks that Dwyer presented the deed to him to sign, and no money was paid him at that time. Several days afterwards, Steffey gave him the balance of \$200.00, the amount which he was to receive. At the first talk Jolly had with Steffey he made arrangements for the taking up of the claims for himself and his wife, and though he did not at that time make an agreement with Steffey to convey the land to him, it was his impression that in view of the fact that he, Steffey, was to furnish the money, Jolly was to convey the claim to him after he made proof. It was his understanding that they were to take it off his hands and that was his impression when he first talked with Steffey about it; it was really a silent understanding that they had. When Jolly entered the claim, he intended to convey it to Steffey and he understood that he was to receive between \$250 and \$300 for it (pp. 2667 to 2669). When the deed was made and Steffey had given Jolly \$200, it was Jolly's understanding that he had performed his part of the agreement, and that Steffey had completed his. When Jolly signed the deed presented by Dwyer, nothing was said about the price to be paid for the land. He signed the deed at Dwyer's request and sent

it to Kester and Kettenbach, because he knew the relations that existed between Dwyer and Steffey, and he understood that in dealing with one that he was dealing with the other, and that Dwyer was the active agent for Kester and Kettenbach; he did not give Steffey a note for the money furnished him nor did he repay the same, and Steffey had never said anything to him about it since (pp. 2669 to 2672). Again Jolly said that it was understood that Steffey would take the land if they wished to let him have it. "Q. Was that the understanding you had when you first spoke to him about the timber claim? A. Yes, sir; that was the impression" (p. 2687). Jolly testified at the land office that the money with which he paid for the land he had earned by freighting and hard labor (p. 3966).

Steffey testified that he located Charles E. Loney and James T. Jolly upon an agreement made between them before either Loney or Jolly went to view the land, that he would furnish them with the money necessary to enter and purchase the claim, pay all their expenses, and guarantee that they would get \$200 apiece over and above all expenses out of their claims (pp. 1783 to 1785, 1787). Loney and Jolly were located together and went to Lewiston to file at the same time, Steffey paid the expenses of the journey from their home to Lewiston, had their filing papers prepared for them, and paid the fee for that service. He gave them the money for filing fees and personally paid for publication (pp. 1785, 1786). On the day of final proof, Steffey met them at Lewiston by agreement and gave each of them \$450 with which to make proof (p. 1787). He obtained the deeds from them to Kester and Kettenbach and

paid them the balance that was due. In all, he gave each of them \$200 over and above what he had furnished them to take up their claims (p. 1789).

THE CLINTON E. PERKINS ENTRY.

Clinton E. Perkins, who resides at Fraser, Idaho, made a timber land entry April 19, 1906 (p. 817). Perkins testified that before applying to enter the land, he had a talk with Steffey at Perkins' home, and Steffey told him that he could locate him on a claim that was not a very good one but that he could make a couple of hundred dollars out of it over and above expenses (pp. 819, 820). He told Steffey that he didn't have the money to pay for a claim; Steffey told him that he would furnish the same (p. 820). Perkins did not even have the money to pay his expenses to Lewiston at the time of filing. Steffey accompanied Perkins to Lewiston when the latter went to file, and Steffey paid his railroad fare from Fraser to Lewiston and return, the hotel expenses while at Lewiston, the filing fee, and the fee for publication. "Q. Now, tell exactly what Mr. Steffey informed you, you would have to do to make the \$200. A. Well, he told me that he was satisfied he could sell the land and I could get \$200 over and above expenses. He said he positively couldn't make a bargain with me, but as far as he was concerned he was a friend of mine and he was satisfied he could get me that much money." That was before Perkins filed. Perkins did not know to whom he was to sell the claim, but he felt in duty bound to sell it to Steffey as he had depended on Steffey (pp. 820 to 826). On the day of final proof, Perkins met Steffey

at Lewiston by appointment. Steffey gave him \$400 with which to make proof and was one of his witnesses. On the same date, Perkins collected \$400 from another source. Perkins said that at the land office he had Steffey's \$400 in one pocket and his own in another and that he made proof with his own money. In reply to the question why he took the money from Steffey if he had money of his own, Perkins said, that the money he had of his own he owed and couldn't afford to have tied up. He didn't give Steffey a note for the money nor did he pay interest on the same (pp. 825 to 829). If he had not received the \$400 from Steffey that day, thinks he would not have made proof; that he would have thrown the whole thing up. After he made proof, Perkins said Steffey gave him another \$100. He guessed it was because he, Perkins, needed it (pp. 829, 830). From the first conversation Perkins had with Steffey, he felt that he should sell the property to him, because he had depended upon him and he had advanced the money. He would not have sold the property to anyone else and he would not have entered the claim at that time if he had not depended upon Steffey. Sold the claim through Steffey to Kettenbach (p. 831). Perkins made proof July 12, 1906 (p. 819) and executed a deed dated September 4, 1906, conveying title to his claim to Kester (p. 833). After the deed was signed, Steffey gave him the balance of the \$200, so the whole matter turned out just as he had thought it would from the start. He received what Steffey had told him he would get and he had no complaint whatever to make. He felt that Steffey had carried out his obligation and that he had concluded his (p. 832).

Steffey testified that before locating Perkins, he had an agreement with him, that Perkins would enter a claim and deed the title to the same to whomsoever he designated for \$200 over and above expenses (p. 1789). Steffey paid Perkins's expenses from Fraser, Idaho, to Lewiston, when the latter made his application to file, also gave Perkins the money to pay filing fees and Steffey paid publication personally. On the day that they made proof Steffey gave him \$400 for that purpose (pp. 1791, 1792). Perkins later conveyed the claim to Kester and Kettenbach. Steffey then gave him \$70, being the balance of the \$200 that Steffey was to give Perkins (p. 1793).

THE FRANK J. BONNEY ENTRY.

Frank J. Bonney made an entry June 27, 1906 (p. 810). Bonney said that Steffey located him on a timber claim but did not charge him a location fee. Steffey told him that the claims were nearly all gone and this one was not much good but if he entered it, he (Steffey) would sell it so that Bonney could make a couple of hundred dollars out of it; thinks Steffey told him he would guarantee him that much. After he had been over the land with Steffey, Bonney went to Lewiston and filed. Steffey gave him the money on two occasions but he does not remember whether this was one of them. Steffey gave him some money but Bonney does not state what it was for; supposes Steffey thought he was short. At final proof Steffey gave him some more money, \$300 or \$400. When Steffey gave him the money he said, "You will probably need a little money." Bonney said that nearly all the money he

used in making proof was his (pp. 796 to 806). "Q. And did you take the money which he gave you and go back in the land office and make proof? A. Let's see. I went down the street some place and then went back up in the land office. Q. And did you make the proof? A. Yes, sir. Q. And did you give them the money that Steffey gave you? A. Well, sir, I had nearly enough money and used a little of that * * *. Q. And what did you do with the rest of it? A. Why, I hung on to it. * * * Q. Didn't Steffey give you that money to make final proof? A. Well, I suppose that is what he intended to do. Q. And didn't you make your final proof with part of that money? A. No, sir, not all of it; I had nearly enough money to make it myself" (pp. 805, 806). "Q. Well, why did you take Steffey's money? A. Well, just like everybody else; they was taking all they could get hold of." * * *

"Q. How did you expect to make proof that day if you hadn't met Steffey? A. Well, I thought maybe I could raise a little money down here." * * *

After Bonney said that he did not pay Steffey anything for his services, he testified as follows: "Q. You were not paying him anything for it, were you? A. No, sir. Q. And why was he guaranteeing you that you could sell it? A. I don't know. Q. Did he give you the \$200? A. Yes, sir" (pp. 806, 807). Bonney did not give Steffey a note for the \$400 nor did he pay him interest on the same, and he did not tell Steffey when he would repay the money. "Q. As a matter of fact, the whole transaction turned out as you expected it would when you had the first talk with Steffey. Is this correct? A. I got my \$200." After Steffey had given

him \$20 at one time and \$400 at another, Bonney thought it wouldn't have been right to sell the land to anybody else as long as Steffey had made the proposition that he thought he could sell it, had shown him the claim, and had let him have the money (p. 808). Bonney made final proof October 11, 1906 (p. 811). He executed a deed conveying the claim to Kester and Kettenbach December 20, 1906 (p. 811). Steffey said that he located Bonney pursuant to an agreement that he had with him before he filed on the claim, that he would locate him, furnish him the money for all expenses and to pay for the land, and that Bonney would get \$175 out of the claim; that as a part of the agreement Bonney was to deed the title of the claim to whomsoever Steffey designated (p. 1793).

RECORDS OF BANK SHOWING RELATIONS BETWEEN KESTER, KETTENBACH, AND STEFFEY IN REGARD TO STEFFEY GROUP.

Steffey did draw his checks on said bank, and when overdrafts were created later gave his notes for the same.

From a comparison of the dates upon which the notes were given and the dates they were either paid or renewed, with the dates of the final proofs and the deeds of entrymen of the Steffey group, it is evident that Steffey was using his bank account in the interest of Kester and Kettenbach and that Kester and Kettenbach were using the funds of the bank through Steffey in the acquisition of these timberlands for themselves; and that almost a year after the last of the Steffey entrymen had conveyed to Kester and Kettenbach their claims, Kester and Kettenbach paid the Steffey notes that remained in the bank.

HARVEY J. STEFFEY'S NOTES.

Date.	Number.	Amount.	Time.	Interest.	Paid.
1906.				<i>Per cent.</i>	
Jan. 22	15263	\$500.00	90 days.....	10	His account not credited amount of note. Paid Mar. 23, 1906, and his account charged amount of note and interest.
Jan. 23	15265	1,200.00	Demand....	10	Paid Dec. 29, 1906. His account not charged but a renewal note for \$1,311.00 given.
Feb. 24	15323	50.00	Demand....	10	Amount of note credited to his account and paid Mar. 28, 1906.
June 12	15477	900.00	90 days.....	10	Amount of note credited to his account and paid by a renewal note for \$949.00 Dec. 29, 1906.
June 19	15498	1,000.00	Demand....	10	Amount of note credited his account. Paid July 12, 1906. Not charged to his account and no record of how note was paid.
Aug. 6	15591	300.00	Demand....	10	Amount of note credited to his account and renewed Dec. 29, 1906, by a note for \$312.00.
Sept. 11	15648	300.00	Demand....	10	Paid Oct. 12, 1906. Neither credited nor charged to his account. No record of how paid.
Dec. 29	15888	1,311.00	Demand....	10	This note is a renewal of note of Jan. 23, 1906, No. 15265, for \$1,200.00 and \$111.00 interest. Paid Dec. 28, 1907, and not charged to Steffey's account.
Dec. 29	15889	949.00	Demand....	10	This note was given in renewal of note dated June 12, 1906, No. 15477, in sum of \$900.00 and \$49.00 interest.
Dec. 29	15890	312.00	Demand....	10	Amount of note credited Steffey's account. Both of said notes paid Mar. 11, 1907. The two notes with interest amounted to \$1,286.00. The records of the bank do not show who paid these notes and on the day before, to wit, Mar. 9 and 10, Steffey's account was overdrawn \$263.26. On Mar. 11 his account was charged with a check for \$25.00 and on the same date his account was credited \$563.80, leaving a balance of \$275.54 at the close of business Mar. 11, 1907.
1907.					
Jan. 17	15937	1,000.00	Demand....	10	Credited to Steffey's account. Paid Dec. 28, 1907; not charged to his account.
Apr. 2	16051	350.00	Demand....	10	Paid Dec. 28, 1907. Steffey's account not charged amount of note or interest.
Apr. 4	16055	700.00	6 months....	10	Credited Steffey's account. Paid Dec. 28, 1907. His account not charged.
July 6	16197	300.00	3 months....	10	Credited Steffey's account. Paid Dec. 28, 1907. His account not charged.

As has been hereinbefore shown, on December 28, 1907, the following of the above-mentioned notes were paid, with interest, by Kester and Kettenbach, each paying one-half thereof:

Number.	Date.	Amount.	Interest at 10 per cent.
15888	Dec. 29, 1906.....	\$1,311.00	\$131.00
15937	Jan. 17, 1907.....	1,000.00	95.50
16051	Apr. 2, 1907.....	350.00	26.00
16055	Apr. 4, 1907.....	700.00	51.40
16197	July 6, 1907.....	300.00	14.00
		3,661.00	318.00—\$3,979.00

At that date Steffey had no account with the Lewiston National Bank, said account having been closed out November 23, 1907.

The ledger of the Lewiston National Bank shows that on December 27, 1907, the account of Kester and Kettenbach was overdrawn \$171.22; that on the following day, December 28, 1907, a deposit was made in said account of \$4,200.00 and one check in the sum of \$3,979.00 charged to that account, leaving a balance of \$49.78; that on December 28, 1907, a check in the sum of \$2,100.00 was charged to the individual account of George H. Kester, and a check in the sum of \$2,100.00 was charged to the individual account of Wm. F. Kettenbach (pp. 3752 to 3758).

The following is a table showing the dates of application to enter made by each of the Steffey entrymen, the dates of final proof, and the dates of the deeds from the entrymen to Kester and Kettenbach:

Name.	Date sworn statement.	Date final proof.	Deed.
Charles S. Myers (pp. 603, 604)...	Oct. 30, 1905	Jan. 22, 1906	Mar. 21-26, 1906 (pp. 614, 1444).
Janie Myers (p. 630).....	Mar. 19, 1906	June 6, 1906	July 11-28, 1906 (p. 631).
Mary A. Loney (p. 2736).....	Mar. 23, 1906	Dec. 3, 1906	Feb. 28 and Mar. 4, 1907 (p. 2737).
Effie A. Jolly (p. 2706).....	Mar. 23, 1906	Dec. 5, 1906	Feb. 28 and Mar. 4, 1907 (p. 2707).
Charles E. Loney (p. 2760).....	Apr. 3, 1906	June 19, 1906	July 11-28, 1906 (p. 2761).

(All of said claims were entered after Steffey had had the Charles S. Myers claim conveyed to Kester and Kettenbach.)

Name.	Date sworn statement.	Date final proof.	Deed.
James T. Jolly (p. 2672).....	Apr. 3, 1906	June 19, 1906	July 11-27, 1906 (p. 2673).
Clinton E. Perkins (p. 832).....	Apr. 19, 1906	July 12, 1906	Sept. 4-10, 1906 (p. 833).
Frank J. Bonney (p. 811).....	June 27, 1906	Oct. 11, 1906	Dec. 20-24, 1906 (p. 812).

From the foregoing abstract and table it will be observed that at the date of the first note of which mention is made, January 22, 1906, in the sum of \$500.00, Charles S. Myers made his final proof and purchased the land, and though this note was given for ninety days it was paid and Steffey's account charged the amount of the note and interest March 23, 1906, two days after the date of the deed from Myers to Kester and Kettenbach, and before said deed was recorded, and while the note still had thirty days to run.

The Charles S. Myers entry was the first of the Steffey group of entries to be made. He entered the claim of Thornberg that Dwyer had contested and Myers had been furnished the relinquishment. None of the other entries composing this group were initiated until the time that Myers conveyed his claim to Kester and Kettenbach. As has been shown, the deed of Myers is dated March 21, 1906. Two days before, i. e., March 19, 1906, Janie Myers, his wife, filed an application at the land office to enter her claim; and on the day that Steffey had the settlement with Kester and Kettenbach relative to Myers's claim and the taking up by Steffey of his note given when Myers made proof, to wit, March 23, 1906, Mary A. Loney and Effie A. Jolly, sisters-in-law of Myers, filed their applications to enter at the land office. This evidence corroborates Steffey's testimony of the relations that existed at that time between him, Dwyer, Kester, and Kettenbach.

On June 19, 1906, the fifth note above mentioned (No. 15498) was made by Steffey in the sum of \$1,000.00

and payable on demand; the day that this note was given Charles E. Loney and James T. Jolly made proof on their claims and paid the purchase price for the same, and these two entrymen, together with Janie Myers, conveyed their claims to Kester and Kettenbach July 11, 1906, and on the following day said last-mentioned note was paid and Steffey's account charged the amount of said note and interest.

The latest of these claims acquired by Kester and Kettenbach were the Mary A. Loney and the Effie A. Jolly entries, which were conveyed to Kester and Kettenbach February 28, 1907. At the date of the deeds to these claims, Steffey had three demand notes at the Lewiston National Bank, i. e.—

	Date.	Amount.
No. 15888.....	Dec. 29, 1906.....	\$1,311.00
No. 15889.....do.....	949.00
No. 15890.....do.....	312.00

The latter two notes were paid March 11, 1907. The records of the bank do not show who paid those notes and Steffey's account was not charged the amount of the notes, but on the morning of that day Steffey's account was overdrawn \$263.26 and at the close of business that day said two notes had been paid and Steffey had a balance to his account of \$275.54. Evidently there was some sort of a settlement on that date between Kester, Kettenbach, and Steffey relative to the two claims last mentioned.

As before shown, five notes and interest amounting to \$3,979.00 were paid by Kester and Kettenbach. On the day of the payment of these notes the joint account of Kester and Kettenbach was overdrawn, but on that

day they each deposited a check in the sum of \$2,100.00 to their joint account, and a check in the amount of said note and interest was on the same day charged to said account.

It would seem most improbable that Kester and Kettenbach, having formerly been officers of the bank and having been relieved of their positions by reason of having been convicted and sentenced for criminal conduct in connection with the land transactions involved in these suits, would pay that number of notes of the amounts mentioned, of another person unless said notes had been given for their use and benefit or unless they were personally responsible for them, and especially after they had been retired from the bank for six months.

In explanation of this transaction Mr. Kettenbach said that Frank W. Kettenbach (who had succeeded him as president) was not satisfied with the Steffey notes, "and Mr. Kester and I told him that if he wasn't thoroughly satisfied with that paper he could charge it to us, that we would take it up, we would buy it of him. * * * And Mr. Kester and I agreed to purchase the paper from the bank. We did it just the same as anybody would purchase any paper; we bought the notes and paid for them and the settlement was made, I suppose, on that date and shows that the notes was paid for" (p. 3773).

The records of the bank show that these notes were *paid not sold*; that Steffey had no account with the bank at that time, his account having been closed the preceding November; that the \$1,311.00 note had been running for a year, and that it was given in renewal of

a demand note and the interest that had accrued thereon, dated January 23, 1906, about two years before and the day after Myers, the first entryman of this group, made proof, and said note was given for Steffey's overdraft created at that time; that two others of said notes were long past due, and the other two were demand notes that had run for about a year. All these notes were unsecured and under the circumstances they could not be considered even a safe investment. Moreover, it would seem rather improbable that Kester and Kettenbach at that time would purchase notes as an investment, or pay notes that they were not obligated to pay, when it is remembered that Kester, in order to straighten out his personal affairs, during the preceding five months, had given his notes to the Lewiston National Bank and the Idaho Trust Company in sums aggregating \$60,000.00 and that *two days after* the payment of said notes by him and Mr. Kettenbach, December 30, 1907, he borrowed from the Lewiston National Bank an additional \$20,000.00 and gave his personal note therefor, defendants' Exhibit E 2 (pp. 4189, 4184); and that on the same day that Kester gave the last-mentioned note Wm. F. Kettenbach borrowed from the Lewiston National Bank \$4,000.00 and gave his note for the same, defendants' Exhibit D 2 (p. 4188).

AFFIDAVITS OF ENTRYMEN IN STEFFEY GROUP.

The defendants introduced in evidence affidavits of four of the Steffey entrymen in which they made statements affirming the statements made in their original applications that their entries were not made pursuant

to a prior agreement, etc., and relating to entries of which they were about to negotiate a sale.

These affidavits appear in the record as defendants' Exhibits A, B, C, D, Y, Z, and A 1. With the exception of the difference in the names, dates, and descriptions, the affidavits are identical, a number of them being carbon copies of the others and their phraseology varying slightly from the affidavits they were required to make in their original sworn statements. The originals of these affidavits are on file in the office of the clerk of this court.

Steffey testified relative to said affidavits that, after the trials of some of the defendants at Moscow, Dwyer gave him a blank form of an affidavit and requested that he have the Steffey entrymen make an affidavit of similar import in order that the defendants might protect themselves as much as possible against any appearance of fraud, Dwyer explaining at the time that Mr. Borah had advised that such affidavits be gotten, as that was the way it was done in southern Idaho. Steffey then had some of the entrymen make the affidavits offered by the defendants, which are in the exact language as the copy of the affidavit furnished him (pp. 1799 to 1801).

All of them contained the clause "that the sale now being negotiated is not the result nor made in pursuance of any agreement, etc."

The affidavit of Charles S. Myers (defendants' Exhibit A) is dated December 21, 1906, while his deed conveying title to Kester and Kettenbach is dated nine months before, i. e., March 21, 1906; the affidavit of

Jannie Myers (defendants' Exhibit B) is dated December 21, 1906, while her deed to Kester and Kettenbach is dated five months prior thereto, i. e., July 6, 1906; the affidavit of James T. Jolly (defendants' Exhibit Z) is dated December 22, 1906, while his deed to Kester and Kettenbach is dated July 11, 1906; the affidavit of Clinton E. Perkins (defendants' Exhibit D) is dated February 28, 1907, while his deed to Kester and Kettenbach is dated September 4, 1906 (pp. 4120, 4162, 4122, 4124, 4159, 4161).

Therefore, at the dates of these affidavits there was no sale under negotiation for said claims, and considering the circumstances under which said affidavits were signed, as is shown by the testimony of Steffey and said entrymen on the subject, they are nothing more than the affidavits of persons desiring them, or of the person securing them, and are evidence of consciousness of guilt or guilty knowledge on the part of the defendants and a preparation on their part for securing of what they considered evidence in anticipation of the present cases, which were not filed until three years after the date of the affidavits.

The same observations apply to the affidavits of Charles W. Taylor (defendants' Exhibit E), Edgar H. Dammarell (defendants' Exhibit I), Edgar J. Taylor (defendants' Exhibit G), and David S. Bingham, dated January 21, 1907, January 22, 1907, November 30, 1906, and January 30, 1907, respectively, except that these affidavits were procured to be used at the criminal trials of the defendants in which the manner of the acquisition of said entries were involved, which trial

began in April, 1907, and all of these persons conveyed title to their claims to defendants in July, 1904 (pp. 4125, 4139, 4134, 4143).

HISTORY OF THE PLEADINGS AND BY WHOM AND HOW THE TITLES TO THE ENTRIES IN THE CASES ARE HELD.

The original bill of complaint in case No. 2209 was filed October 14, 1907, and involved all of the entries now contained in case No. 2209, as amended, and also in case No. 2210, with the exception of the entries of Cornell, Lambdin, Shaeffer, and Waldman, which were in suit for the first time in No. 2210 (pp. 3 to 29).

A notice of *lis pendens* was also filed on the date the original suit was filed (p. 1463).

The defendants attacked the bill by demurrer and an amended demurrer. The third ground of the amended demurrer was that the bill was unintelligible, indefinite, and uncertain in that it did not show that the land involved in the bill was ever transferred to the defendants or any of them, or that any part of it had ever been transferred from the original entrymen to the defendants or other persons, or that the defendants or any of them were at that time owners of the land or any part thereof; and demanded judgment on the amended demurrer (p. 35).

On November 7, 1908, the court made an order sustaining the demurrer on the third ground and granting complainant leave to amend (p. 42).

On April 23, 1909, the defendants in No. 2209 moved the court to dismiss the bill on the ground that the com-

plainant had failed to amend the bill. This motion was denied May 12, 1909, and the complainant was given until May 25, 1909, to amend his bill (pp. 47, 50).

On May 22, 1909, an amended bill in No. 2209 was filed, which involved the entries, the title to which was in the names of W. F. Kettenbach and Kester, either jointly or severally, made by the following-named entrymen (pp. 50 to 86):

Entries involved in No. 2209 as amended:

Incorporated in bill in case No. 2210 by amend- ment (p. 4499).	Carrie D. Maris.	Robnett group.
	John H. Little.	
	Ellsworth M. Harrington.	
	Wren Pierce.	
	Benjamin F. Bashor.	
	Joseph B. Clute.	
	Francis M. Long.	
	John H. Long.	
	Bertsel H. Ferris.	
	George Ray Robinson.	
Charles W. Taylor.	O'Keefe group.	
Jackson O'Keefe.		
Edgar J. Taylor.		
Joseph H. Prentice.		
Fred E. Justice.		
Edgar H. Dammarell.		
Benjamin F. Long—Robnett group.		

The bills of complaint in cases numbered 2210 and 2211 were filed September 4, 1909, and notices of lites pendentes were filed the same day (pp. 4225 to 4285; 4575 to 4608; 1469, 1474).

The titles to all of the entries involved in suit No. 2211 are in the names of W. F. Kettenbach and Kester,

and the claims were entered by the following-named entrymen:

Charles S. Myers.
Jannie Myers.
Mary A. Loney.
Effie A. Jolly.
Charles E. Loney.
James T. Jolly.
Clinton E. Perkins.
Frank J. Bonny.

Steffey group:
(pp. 4575 to 4608).

The claims involved in suit No. 2210 were entered by the following-named persons, and the titles of record to said claims are as follows (pp. 4225 to 4285):

Names of entrymen.	Title of record as follows:
James C. Evans.....	James C. Evans to Kettenbach & Kester. Deed. Dated June 17, 1903. Recorded Aug. 10, 1903 (p. 1633). Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907 (p. 1719).
Lon E. Bishop.....	Lon E. Bishop to Kettenbach & Kester. Deed. Dated June 17, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1484).
Frederick W. Newman..	Frederick W. Newman to Kettenbach & Kester. Deed. Dated June 17, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1506).
Charles Dent.....	Charles Dent to Kettenbach & Kester. Deed. Dated June 23, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1485).
Charles Smith.....	Charles Smith to Kettenbach & Kester. Deed. Dated June 23, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1511).
George Morrison.....	George Morrison to Kettenbach & Kester. Deed. Dated June 26, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1503).
Edward M. Hyde.....	Edward M. Hyde to Kettenbach & Kester. Deed. Dated June 26, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1496).
Guy L. Wilson.....	Guy L. Wilson to Kettenbach & Kester. Deed. Dated July 13, 1904. Recorded June 24, 1907. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1519).

The Idaho Trust Co. took title to these entries without paying value therefor and with knowledge of the invalidity of said titles and now holds the title to these entries in trust for Kester & Kettenbach.

Names of entrymen.	Title of record as follows:	
Daniel W. Greenberg....	Daniel W. Greenberg to Kettenbach & Kester. Deed. Dated Aug. 15, 1904. Recorded Jan. 24, 1906. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (pp. 1488, 1489).	The Idaho Trust Co. took title to these entries without paying value therefor and with knowledge of the invalidity of said titles and now holds the title to these entries in trust for Kester & Kettenbach.
David S. Bingham.....	David S. Bingham to J. O'Keefe. Deed. Dated July 26, 1904. Recorded Jan. 18, 1906. J. O'Keefe to Kettenbach & Kester. Q. C. deed. Dated July 30, 1904. Recorded Jan. 31, 1906. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907 (pp. 1482, 1483).	
Wm. E. Helkenberg.....	Wm. E. Helkenberg to Kester & Kettenbach. Deed. Dated Oct. 18, 1905. Recorded Nov. 11, 1905. Kester & Kettenbach to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (pp. 1494, 1495).	
Joseph B. Clute. (Amended, p. 449.)	Joseph B. Clute to Kettenbach & Kester. Deed. Dated June 17, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1699).	
Wm. McMillan.....	Wm. McMillan to Kittie E. Dwyer. Deed. Dated Apr. 9, 1906. Recorded Apr. 9, 1906. Kittie E. Dwyer to the Idaho Trust Co. Deed. Dated Dec. 31, 1908. Recorded Jan. 4, 1909 (pp. 1501-1502).	The Idaho Trust Co. took titles to these entries without paying value therefor and with knowledge of the invalidity of said titles and holds the same in trust for Kester, Dwyer, and Robnett.
Hattie Rowland.....	Hattie Rowland to Kittie E. Dwyer. Deed. Dated Apr. 9, 1906. Recorded Apr. 9, 1906. Kittie E. Dwyer to the Idaho Trust Co. Deed. Dated Dec. 31, 1908. Recorded Jan. 4, 1909 (pp. 1508, 1509).	
Van V. Robertson.....	Van V. Robertson to Lewiston National Bank. Deed. Dated Sept. 27, 1904. Recorded Oct. 10, 1904 (p. 1507).	Lewiston National Bank took title to said entries without paying value therefor and with knowledge of the invalidity thereof and now holds the same in trust for Kester, Kettenbach, Robnett, and Dwyer.
Drury M. Gammon.....	Drury M. Gammon to Robnett. Deed. Dated Oct. 9, 1903. Recorded Nov. 16, 1904. Robnett to Lewiston National Bank. Deed. Dated Nov. 25, 1904. Recorded Dec. 20, 1904. At request Robnett (pp. 1486, 1487). Robert O. Waldman to Clarence W. Robnett. Deed. Dated May 26, 1903. Recorded Oct. 2, 1903 (p. 1637). Clarence W. Robnett to Elizabeth White. Deed. Dated July 8, 1907. Recorded July 8, 1907.	
Robert O. Waldman. (See amendment, p. 449.)	Elizabeth White to Lewiston National Bank. Deed, Q. C. Dated Oct. 25, 1907. Recorded Oct. 28, 1907. Robnett to Lewiston National Bank. Q. C. deed. Dated Oct. 25, 1907. Recorded Oct. 28, 1907 (pp. 3694, 3695).	
Wm. B. Benton.....	Wm. B. Benton to C. W. Robnett. Deed. Dated Jan. —, 1902. Recorded Apr. 27, 1903. C. W. Robnett to Elizabeth White. Deed. Dated July 8, 1907. Recorded July 8, 1907. Elizabeth White to Clearwater Timber Co. Deed. Dated Sept. 4, 1907. Recorded Sept. 16, 1907 (pp. 1479 to 1481).	
Joel H. Benton.....	Joel H. Benton to Robnett. Deed. Dated Dec. 29, 1902. Recorded Apr. 27, 1903. Robnett to Elizabeth White. Deed. Dated July 8, 1907. Recorded July 8, 1907. Elizabeth White to Clearwater Timber Co. Deed. Dated Sept. 4, 1907. Recorded Sept. 16, 1907 (pp. 1477 to 1479).	The Clearwater Timber Co. took and now holds title to said claims knowing the entries to be invalid and voidable at the suit of the United States.
Pearl Washburn.....	Pearl Washburn to Jas. B. McGrane. Deed. Dated May 23, 1906. Recorded Nov. 9, 1906. Jas. B. McGrane to John E. Chapman. Deed. Dated May 8, 1907. Recorded June 6, 1907. John E. Chapman to Clearwater Timber Co. Deed. Dated June 7, 1907. Recorded June 21, 1907 (pp. 1513 to 1515).	

Names of entrymen.	Title of record as follows:	
Wm. and Alma Haevernick.	Wm. Haevernick and Alma Haevernick to Frank W. Kettenbach. Deed. Dated June 3, 1904. Recorded June 14, 1907.	The Clearwater Timber Co. took and now holds title to said claims knowing the entries to be invalid and voidable at the suit of the United States.
Geary Van Artsdalen...	Frank W. Kettenbach to Clearwater Timber Co. Deed. Dated June 12, 1907. Recorded July 13, 1907 (p. 1490).	
John E. Nelson.....	Geary Van Artsdalen to Clearwater Timber Co. Deed. Dated Dec. 2, 1905. Recorded June 23, 1905 (p. 1512.)	
Soren Hansen (amendment).	John E. Nelson to E. W. Thatcher. Deed. Dated May 18, 1908. Recorded May 20, 1908 (p. 1505).	Purchased while present case pending.
Wm. J. White.....	(Will be mentioned later.)	
Mamie P. White.....	Wm. J. White to Elizabeth White. Deed. Dated Jan. 13, 1909. Recorded Jan. 15, 1909 (p. 1518).	Elizabeth White acquired and still holds title to said entries with knowledge of the invalidity thereof.
Edna P. Kester.....	Mamie P. White to Elizabeth White. Deed. Dated Jan. 13, 1909. Recorded Jan. 15, 1909 (p. 1517).	
Elizabeth White.....	Still hold in trust for Kester, Kettenbach, Robnett, and Dwyer.	
Martha E. Hallett.....	Ivan R. Cornell to Kettenbach & Kester. Deed. Dated Sept. 29, 1903. Recorded Oct. 10, 1903..	Potlatch Lumber Co. took title to and holds same with knowledge of fraud and invalidity of said entries.
Ivan R. Cornell.....	Kettenbach & Kester to Potlatch Lumber Co. Deed. Dated Aug. 21, 1906. Recorded Oct. 9, 1906 (pp. 1971, 1972).	
Rowland A. Lambdin..	Rowland A. Lambdin to Kettenbach & Kester. Deed. Dated July 22, 1902. Recorded July 8, 1903.	
Fred W. Shaeffer.....	Kettenbach & Kester to Potlatch Lumber Co. Deed. Dated June 17, 1903. Recorded June 18, 1903.	
Frances A. Justice.....	Fred W. Shaeffer to Kettenbach & Kester. Deed. Dated July 26, 1902. Recorded June 8, 1903.	
	Kettenbach & Kester to Potlatch Lumber Co. Deed. Dated June 17, 1903. Recorded June 18, 1903 (pp. 1968 to 1970).	
	Frances A. Justice to Kittie E. Dwyer. Deed. Dated Mar. 30, 1906. Recorded Apr. 4, 1906 (p. 1497).	Kittie E. Dwyer holds in trust for Kester, Kettenbach, Dwyer, and Robnett.

SPECIFICATION OF ERRORS.

The assignment of errors in case No. 2209 is set out at page No. 4209 of the record; in case No. 2210, at page No. 4545; and in case No. 2211, at page 4706.

As the errors assigned in the three cases are numerous and are with slight variation the same in each case, we shall for the convenience of the court set out here only the substance of the errors relied upon.

I.

That the court erred in dismissing the bills of complaint in the three cases as to all the entries therein specified except the entries of Guy L. Wilson, Frances A. Justice, and Robert O. Waldman involved in case No. 2209, as to which said three entries the prayer in the bill of complaint was granted.

II.

That the court erred in not granting by decrees appropriate to that end the relief prayed in the bills of complaint as amended filed by the complainant in said cases.

III.

That the court erred in failing to find from the evidence in said cases that the defendants named in said bills of complaint as amended in each of said cases (the defendants mentioned in this connection in case No. 2209 are Kester, Kettenbach, Dwyer, and Robnett) had conspired among themselves, with each other, and with divers other persons named in said bills, and named and indicated in the evidence, to defraud the United States in the manner and for the purposes stated and charged in said bills of complaint as amended, and that the said defendants did so defraud the United States in such manner and in respect of the lands of the United States described in said bills.

IV.

That the court erred in finding and in holding that the evidence is insufficient to justify the cancellation of the patents to the entries of Fred E. Justice, Benja-

min F. Bashor, Wren Pierce, Frances M. Long, Benjamin F. Long, John H. Long, Ellsworth M. Harrington, John H. Little, Bertsel H. Ferris, George Ray Robinson, Edgar H. Dammarell, Joseph H. Prentice, Edgar J. Taylor, Charles W. Taylor, and Jackson O'Keefe, described and designated in the bill of complaint in case No. 2209; and that said entries are valid.

V.

That the court erred in finding and in holding that the evidence is insufficient to justify the cancellation of the patents to the entries of Edna P. Kester, Elizabeth Kettenbach, William J. White, Elizabeth White, Mamie P. White, Martha E. Hallett, Lon E. Bishop, Frederick W. Newman, Charles Dent, Charles Smith, James C. Evans, Joseph B. Clute, William B. Benton, Hattie Rowland, William McMillan, Pearl Washburn, Daniel W. Greenburg, George Morrison, Edward M. Hyde, John E. Nelson, Van V. Robertson, Soren Hansen, and David S. Bingham, described and designated in the bill of complaint in case No. 2210, and that said entries are valid.

VI.

That the court erred in finding and in holding that the titles to the lands designated and described in the bill of complaint as amended in case No. 2209, with the exception of the land described in the entry of Carrie D. Maris, were obtained from the United States in accordance with law and without fraud, and that said titles are valid in the hands of the defendants William F. Kettenbach and George H. Kester, and

that said defendants Kester and Kettenbach took title to the Maris entry as innocent purchasers, in good faith, for value, and without knowledge or notice of any fraud or illegality in the title to said land.

VII.

That the said court erred in finding that the defendant, the Lewiston National Bank, took the title to the land contained in the entry and claim of the said Drury M. Gammon described in the bill of complaint in case No. 2210, without any notice of its infirmity; and in holding in effect that the defendant, the Lewiston National Bank, purchased the land designated and described in said claim and entry under such circumstances as constituted the said defendant, the Lewiston National Bank, an innocent purchaser of the said land in good faith, for value and without knowledge or notice of any fraud or illegality in the title to said land.

VIII.

That the said court erred in finding that while the question whether the defendant, the Clearwater Timber Company, was an innocent purchaser was not entirely free from doubt that said company did not have such knowledge of the circumstances under which the entry and claim of Joel H. Benton was made, or such notice of the claims of the Government as to put it upon inquiry; and in holding in effect that the defendant, the Clearwater Timber Company, purchased the land designated and described in said claim and entry under such circumstances as constituted said defendant, the Clear-

water Timber Company, an innocent purchaser of the said land in good faith, for value and without knowledge or notice of any fraud or illegality in the title to said land; and in failing to hold that said company took the titles to the entries of Van V. Robertson and Drury M. Gammon, described in the bill of complaint in case No. 2210, with notice and knowledge of the invalidity thereof, and holds the same in trust for, and to the use of the defendants Kester, Kettenbach, Dwyer, and Robnett.

IX.

That the said court erred in failing to hold that the entries of William B. Benton and Pearl Washburn, designated and described in complainant's bill of complaint in case No. 2210 were entered in fraud of the laws of the United States, and are invalid, and that the defendant, the Clearwater Timber Company, now hold the title to said entries together with the entry of Joel H. Benton, hereinbefore referred to, and took the title to said entries with full knowledge and notice of the invalidity of said entries.

X.

That the said court erred in failing to hold, upon a finding of facts appropriate thereto and properly to be made upon the evidence herein, that the entries and claims of James C. Evans, Lon E. Bishop, Frederick W. Newman, Charles Dent, Charles Smith, George Morrison, Edward M. Hyde, Daniel W. Greenburg, David S. Bingham and William E. Helkenburg, William McMillan and Hattie Rowland, designated and

described in complainant's bill of complaint as amended in case No. 2210, were made and entered in fraud of the United States, and in fraud of the laws of the United States relating to such matters, and are invalid and voidable at the suit of the United States, and that the defendant, the Idaho Trust Company, which holds the title to the lands contained in said claims and entries, took title to the same with full notice and knowledge of the invalidity of said entries and claims and now holds the same, with the exception of the McMillan and Rowland entries, in trust for, and to the use of the defendants, Kester and Kettenbach, and the McMillan and Rowland entries it holds for the use and benefit of Kester, Kettenbach, Dwyer, and Robnett, all in the manner stated and charged in said bill of complaint.

XI.

That the said court erred in failing to hold that the entry of John E. Nelson, designated and described in the bill of complaint in case No. 2210, was made and entered in fraud of the laws of the United States and is invalid, and that the defendant, Elizabeth W. Thatcher, who now holds the title to said entry, took the same with full notice and knowledge of the invalidity of the title to said entry.

XII.

That the said court erred in failing to hold, upon a finding of facts appropriate thereto and properly to be made upon the evidence herein, that the claim and entry of Soren Hansen, designated and described in complainant's bill of complaint as amended, in case No.

2210, was made and entered in fraud of the United States and in fraud of the laws of the United States relating to such matters, and that the defendant, William F. Kettenbach, in whom the title to said claim and entry now vests took the same with full knowledge, notice, and information concerning the invalidity of said entry and well knowing said entry and the title issued thereupon were unlawful, corrupt, fraudulent, invalid, and voidable at the suit of the United States.

XIII.

That the said court erred in failing to hold upon a finding of facts appropriate thereto and properly to be made upon the evidence herein that the claims and entries of William J. White and Mamie P. White, designated and described in complainant's bill of complaint as amended in case No. 2210, were made and entered in fraud of the laws of the United States relating to such matters; and that the defendant Elizabeth White, who now holds the title to said entries, took the same with full knowledge and notice concerning the invalidity of said entries.

XIV.

That the said court erred in failing to hold that the entries of Edna P. Kester, Elizabeth White, Elizabeth Kettenbach, and Martha E. Hallett described in the bill of complaint in case No. 2210 were made by said last-named defendants in fraud of the laws of the United States relating to such matters, and that the titles to said entries is now vested, respectively, in said defendants, who hold the same in trust for the use and

benefit of the defendants, Kester, Kettenbach, Dwyer, and Robnett.

XV.

That the court erred in failing to hold that the entry of Joseph B. Clute, designated and described in complainant's bill of complaint as amended, in case No. 2210, was made and entered in fraud of the United States and in fraud of the laws of the United States relating to such matters, and are invalid and voidable at the suit of the United States, and that the defendant, the Idaho Trust Company, which now holds the title to the land contained in said claim and entry took the same with full knowledge, notice, and information concerning the invalidity of said entry, and well knowing that the said entry and claim and the title issued thereupon were unlawful, corrupt, fraudulent, invalid, and voidable at the suit of the United States, all in the manner stated and charged in said bill of complaint.

XVI.

That the said court erred in finding and in holding that the defendants in case No. 2211 did not have any knowledge or reason to believe that Harvey J. Steffey had any unlawful arrangement or understanding with the entrymen named and mentioned in said bill of complaint as amended.

XVII.

That the said court erred in failing to find and to hold that Harvey J. Steffey was the agent of the said defendants in procuring the entries involved in com-

plainant's bill of complaint in case No. 2211 to be made in fraud of the laws of the United States.

XVIII.

That the said court erred in failing to find and to hold that the defendants had reason to believe, and had knowledge of the fact that Harvey J. Steffey had unlawful arrangements, understandings, and agreements with all of the entrymen mentioned and named in said bill of complaint in case No. 2211, relative to the acquisition and disposition by said entrymen of the lands contained in their entries as charged in said bill of complaint.

XIX.

That the said court erred in finding and in holding in effect that the defendants, Kester and Kettenbach, purchased the lands designated and described in complainant's bill of complaint, in case No. 2211, under such circumstances as constituted the said defendants innocent purchasers of the said land in good faith, for value and without knowledge or notice of any fraud or other illegality in the title to the said lands.

XX.

That the said court erred in finding and in holding that the preponderance of the evidence is against the theory that the defendants, Kester, Kettenbach, and Dwyer, were jointly interested in the acquisition of title to the lands involved in this cause, as set out and described in complainant's bill of complaint in cases Nos. 2209 and 2210.

XXI.

That the said court erred in finding and in holding that at no time during the period covered by the transactions complained of in case No. 2209 was there any associational arrangement, either by way of partnership, or joint ownership, or otherwise, between the defendants Kester, Kettenbach, and Dwyer, or any one of them, and the defendant Robnett in the acquisition of the title to any of the lands involved in this case, as set out and described in complainant's bill of complaint as amended.

XXII.

That the said court erred in finding and in holding that the defendant Dwyer had no joint or partnership interest with the defendants Kettenbach and Kester, or either of them, in the lands involved in case No. 2209, which the latter purchased, as set out and described in complainant's bill of complaint as amended.

XXIII.

That the said court erred in holding in effect that, in the circumstances and upon the facts established by the evidence herein, the defendants were innocent purchasers of the lands involved in case No. 2210, in good faith, for value, and without notice or knowledge of fraud, illegality, or other defects in the titles to the said lands.

BRIEF OF ARGUMENT.**CONSIDERATION OF THE GENERAL EFFECT OF ALL THE EVIDENCE.**

What has been mentioned hereinbefore suffices to prove that the defendants, W. F. Kettenbach, Kester, Dwyer, and Robnett, in the spring of 1902 formed a conspiracy to obtain public timberlands in quantities greatly exceeding the area permissible by law, and that this conspiracy and agreement was intended to be, and was, made effective through the procurement, on a large scale, of entries under the timber and stone act, and that this procurement was accomplished by means of agreements for the acquisition of the lands, which agreements are of the character prohibited by the timberland statute, and that later Kester, Kettenbach, and Dwyer joined to themselves Steffey, for the same purpose and the same result was attained.

The evidence establishing this proposition is the whole of the evidence taken in the cases and that evidence as a whole. The general character and effect of this evidence are indicated in the statement hereof which is prefixed to this argument and which sets out the transactions proved with what doubtless appears undue prolixity, but in reality quite meagerly, and by mention of only the most material features of the history. It is unnecessary, and it would be impos-

sible, here to recapitulate all the circumstances tending to suggest that the entries were made in pursuance of unlawful agreements or on speculation and to further array the host of details which unite to render those suggestions a fixed conviction.

We must, however, bear in mind the circumstances under which Kettenbach, Kester, Dwyer, and Robnett began their operations in acquiring timber claims; their solicitations of their relatives, friends, and acquaintances to make entries in their behalf; the contests instituted of claims upon which filings had been made with the view of entering persons they controlled upon the claims when the contests would be decided or settled; the securing the employment of Dwyer as State selector in order that the State would not select the lands that they had arranged to file entrymen upon April 25, 1904; the fact that every entry was made at the solicitation of one of said defendants, or of their agents or coconspirators, Emory, O'Keefe, and Steffey, and with two or three exceptions they furnished the money for the entrymen to initiate the entries and to pay for the land and all incidental expenses; and that they acted in concert in their endeavor until the last entry that is involved in these cases had passed to Kester, Kettenbach, Robnett, or Dwyer, or through them to the person or corporation now holding the titles.

But the force of this evidence lies not so much in any or in many circumstances, though there are enough of those which are pregnant of proof, as in the cumu-

lative effect and the concurrent corroboration of all the facts.

The entire transaction, surveyed from its beginning to its end, appears to be a single enterprise, developed upon one general design, animated by a single motive, and executed upon certain uniform principles, with which all the incidents are entirely consistent. Whether viewed in its general aspect or examined in its details, the enterprise appears to have been conceived in fraud of the law and carried into effect by fraudulent means. No one can read this evidence without being profoundly impressed by the evidence, as a whole, that the defendants procured the entries to be made, and that such procurement was effected by means of agreements, or of understandings which were the moral equivalent of agreements, either expressed or implied, entered into with the entrymen, in advance of applications filed, by which the entrymen considered themselves bound to sell, and the defendants bound to buy, the lands to be entered. It is true that there were but few formal contracts made and that there were no contracts or agreements in writing, but it has been decided that the agreements denounced by the act of 1878 are not enforceable agreements, but are such understandings as, by reason of the statutory provision, depend for their execution upon the voluntary action of the parties and upon their conceptions of honor and moral duty.

Olson v. United States, 133 Fed. Rep., 849, 853.

U. S. v. Detroit Timber & Lumber Co., 200 U. S., 321.

Many of the entrymen appear to have supposed that there could be no contract that was not in writing, a circumstance mentioned in the case of the Detroit Company, *supra*, as affecting the value of such denials of a contract. It is not necessary, in order that the transaction shall be fraudulent, that the entrymen shall be intentionally and consciously guilty of wrongdoing, as also is held in the case of Detroit Company, *supra*.

The fact that many of the entrymen denied on cross-examination that they made agreements antecedently to making their applications does not go very far in any instance to show that agreements in fraud of the statute did not exist. As has been suggested, some of the entrymen had the notion, which is perhaps the prevalent popular notion, that there can be no contract which is not written. Probably most of them supposed, with more or less sincerity, that an explicit promise in express words was necessary to constitute a contract, but few, if any, had any conception of the contracts intended to be prohibited by the act of 1878 or understood that such understandings as have been herein characterized were unlawful, as has been adjudicated in the cases of Olson and the Detroit Co. All of the entrymen were disposed to put the fairest face possible upon their conduct, and the more so in cases where their conduct was felt to be compromising. Most of the entrymen were manifestly well disposed toward, if not actively sympathetic with, the defense, as will appear from almost any cross-examination taken at random from the transcript. The cross-examination of these Government witnesses was most remarkably protracted,

constituting probably one-half the testimony of the witnesses, and being certainly of a volume enormously disproportionate to the examination in chief. The reason for this is apparent upon the face of the situation. The Government, in order to elicit the facts upon which its cases are predicated, was obliged to show by the entrymen, whom these defendants had used, that the entry had been made and the circumstances of its making. All of these entrymen, with perhaps some few exceptions, whether they were or were not consciously guilty of wrongdoing, were naturally solicitous to purge themselves of any blame on account of what they had done. They were therefore predisposed to lend themselves to any cross-examination which sought to put their own conduct in a better light, and they accepted with avidity any suggestions with the color of innocence, and many instances can be found in the record showing the willingness of the Government witnesses to grasp at friendly suggestions from the defense.

So whether or not any one of the entrymen had entered into such an arrangement as is forbidden by the statute is not to be established entirely by what he says in response to a question framed in the words of the statute and admitting of a categorical answer, *but is to be inferred from the arrangement as it is proved*. And the testimony to this point of these entrymen is to be weighed like other testimony, with reference to the considerations of self-interest and self-protection pressing upon the witnesses; to their natural disposition to state their actions in the light most favorable to themselves; to their friendly attitude toward the

defense, which was so often developed by a sympathetic cross-examination; and to the inherent reasonableness of what they say and the harmony of the facts to which they testify, with other facts established in the case.

But, as has been said, notwithstanding the attitude of the entrymen and the other witnesses in these causes, their testimony as a whole, viewed in the light of undisputed facts and circumstances, establishes the fact that the entrymen made their entries in pursuance of an antecedent agreement or understanding with said defendants or their agents that the titles thus initiated should devolve to Kester, Kettenbach, Dwyer, or Robnett or to whomsoever they or their agents designated.

It is sufficient to say that the methods pursued, and the form of the negotiations, were precisely those which would naturally be adopted by persons meditating an unlawful proceeding and seeking to evade the inhibition of agreements for the sale of the lands. In such a case much would designedly be left unexpressed, and the arrangement would be purposely formulated in such manner as to appear without the sense of the statute, and would be clothed in such innocent guise as not to shock the tender conscience of a well-intending entryman. But the result intended, and the result accomplished, was the identical result which the statute was framed to prevent. Call it an arrangement, an understanding, an implied obligation, or what else may soothe the moral sense, the negotiation with the entryman had all the effect of a distinct and binding agreement that

he should transfer his title to Kester, Kettenbach, Robnett, or Dwyer, or to whomsoever they or their agents might designate. If such a transaction is not unlawful, then the statute renders itself ridiculous by lending itself to evasion of its prohibitions and by providing the means for its own defeat.

In *Nickell v. United States*, 161 Fed., 702, 706, decided by this court, it was said:

Section 2 of the act of June 3, 1878 * * * requires the entryman at the time of making his application to make oath that he has not made any agreement or contract in any way or manner, directly or indirectly, with any person or persons, by which the title shall inure to the benefit of any person except himself. That it was intended to meet the evasions which would be resorted to from time to time is quite manifest. Schemes, devices, and subterfuges which ingenuity could invent, and of which this case furnished a striking example, were in view equally with formal contracts. We are precluded from holding otherwise by the comprehensive language of the statute; and to sustain the contention of plaintiff in error in that regard would be equivalent to saying that its purpose can be entirely defeated by secret understandings and ingenious circumventions.

PRECEDENTS AS TO WEIGHT GIVEN EVIDENCE ANALOGOUS
TO THAT EMBODIED IN PRESENT CASES.

II.

On questions of fact precedents are generally of little weight, and other cases can seldom be controlling. Two reported cases, however, present states of fact so closely analogous to that embodied in the present evidence that the adjudications made in those cases have almost or quite the effect of an authority.

Olson v. United States, 133 Fed. Rep., 849, involved just such procurement as is shown here, and upon the facts, which were much less extensive and far less cogent, the Circuit Court of Appeals drew the inference of unlawful agreements.

United States v. Detroit Lumber Company, 124 Fed. Rep., 393; 131 Fed. Rep., 668; 200 U. S., 321, was even more strikingly similar upon the facts to the present case. In that case the bill was dismissed in the lower court, but the ruling of that court was reversed by the Circuit Court of Appeals, and the decision of the Appellate Court affirmed by the Supreme Court of the United States, and in order that we may more clearly see the application of the decisions of the Circuit Court of Appeals and the Supreme Court, we shall state the facts as found by the trial court and the reasons given for dismissing the bill. District Judge Rogers, who heard the case in the Circuit Court (124 Fed., 395), in the opinion said:

This bill was filed to vacate these patents upon one of two grounds: First. That there was

a conspiracy between Elmer B. Martin and Arch. V. Alexander, president and secretary, respectively, of the Martin-Alexander Lumber Company, and Jim P. Copeland, an employee of said company, and also an entryman, with their codefendants, who were entrymen, to induce and procure the entrymen fraudulently to make application to the land office of the United States at Camden, Ark., to enter each a separate portion of the said land, and that before said entries were made by said entrymen they had each entered into an agreement with the Martin-Alexander Lumber Company that each and every entry so made should be made for the use and benefit of the said Martin-Alexander Lumber Company, and that on the issuance of the receiver's receipts that each entryman should at once execute to the said Martin-Alexander Lumber Company a conveyance to it of all the timber and trees standing and growing upon the lands so entered, with certain other rights and privileges in the nature of easements upon said land. Second. That if such agreement and conspiracy did not exist, that each and every of said entrymen made his or her said entry on speculation, and not in good faith for the purpose of appropriating the same to his or her own use and benefit, which was well known to the said Martin-Alexander Lumber Company, and said Martin-Alexander Lumber Company aided and assisted each and every one of said entrymen in the accomplishment of said purpose, to wit, the entering of said lands on speculation. To this last allegation, which was an amendment, a demurrer was entered, and a stipulation filed to the effect that,

if the demurrer was overruled, the answer on file to the original complaint should be treated as applying to this allegation. The court overrules the demurrer, and will treat this allegation as denied by the original answer on file, in accordance with the stipulation. Each of the defendant entrymen answered, denying specifically the allegations of fact in the complainant's bill of complaint in so far as it alleged any fraudulent conduct upon their part, and each of the entrymen affirmed that the affidavits which they had made at the land office were true, and that the lands were purchased for their own use and benefit, and so appropriated. The Martin-Alexander Lumber Company and Detroit Timber & Lumber Company denied the allegations of fraud, and the latter also set up that it was an innocent purchaser. To these answers a replication was filed, and the case submitted upon pleadings and written proof. The record is most voluminous, and it is unnecessary to go into details. Two questions arise on this record: First. Is there such a combination or conspiracy shown to have existed between the Martin-Alexander Lumber Company and their codefendants (the entrymen) to obtain the lands in controversy for the use and benefit of the Martin-Alexander Lumber Company, as authorizes the annulment of the patents issued to the defendant entrymen? Second. Did the several entrymen make their said entries on speculation, and not in good faith, and not for the purpose of appropriating the lands to their own use and benefit? It will be more convenient to consider both questions together.

The proof in this case develops this state of facts: The Martin-Alexander Lumber Company had established a large sawmill and lumber plant in close proximity to the lands in controversy, and had also become the owners of large bodies of timberland adjacent thereto. There was no other sawmill or lumber plant, at the time these lands were entered, so near thereto as to make it practicable or profitable to cut the timber standing on the lands in controversy. The lands in controversy were not on the market except under the homestead law, and the stone and timber act, *supra*. Naturally the Martin-Alexander Lumber Company wanted all the timber it could get which was convenient to its mill plant. It had in its employ as timberman, or timber inspector, Jim P. Copeland, a resident of Pike City, where its mill plant was located, and he was an old surveyor, as well as real estate man, with large experience and much information in regard to lands in that vicinity; and was also well acquainted with the people residing in that vicinity, and especially with the lands, both public and private, in that county. Early in 1899 E. B. Martin, the president of the Martin-Alexander Lumber Company, who resided in Chicago, inquired of Copeland about timberlands in the county where the mill plant was located. Copeland informed him that there were many public lands in the county and adjacent to the mill plant valuable for their timber, and gave him the approximate amount. Martin then inquired how they could be procured. Copeland then told him they could be homesteaded, but the timber could not be cut until the patent was obtained or the homesteader had

resided on the land for the period of five years and in other respects conformed to the requirements of the homestead law. The proof also shows that these lands were not fit for cultivation, but were only valuable for their timber. Something was then said in reference to scrip which could be used in the entry of the lands. In the course of the conversation Copeland told Martin of the stone and timber act. Prior to this time he had written to the Member of Congress, Hon. T. C. McRae, and obtained a copy of it, and afterwards, having occasion to go to Camden, he had laid the law before the land officers, and he and they read it over together, and he obtained their construction of it. He also informed Mr. Martin that he knew of a number of good, honest people in the community who would like to take up land under the stone and timber act if they had the money. Copeland had at that time talked to some men whom he knew personally and favorably, who had expressed a desire to take up land under that act if they could get the money, and he so advised Martin. Martin then told him that they would loan that class of men the money if they would take up the land. Copeland then inquired what security he would demand, and he said simply their note, with 8 per cent interest. Copeland then hunted up the men that he had talked to, and others also, and others hunted him up to inquire about the entry of these lands, and he explained to them the law, and told them they could get the money to enter the lands from the Martin-Alexander Lumber Company, without security, and that the Martin-Alexander Lumber Company would trust to their honor to pay it,

He took them and showed them the lands, made them a probable estimate of the timber in the respective tracts, and told them that the timber on the land at 50 cents a thousand feet (which was the market price at that time) would pay more than the land would cost, and told them they could sell the land or the timber after the patents were issued. All the codefendants of the Martin-Alexander Lumber Company, nearly all of whom were employees, or had been, of the company, entered the land under the conditions just above stated. The money was furnished by the Martin-Alexander Lumber Company. Copeland usually went with the parties to examine the land, accompanied them to the land office, and furnished them the money, and they entered the land, made the necessary proofs in conformity with law, and their expenses to the land office and back were paid by the Martin-Alexander Lumber Company and charged to them upon the books of the company. Either just before the lands were entered and the receipts for the purchase money were obtained, or just afterwards, the money having been furnished to the entrymen by Martin-Alexander Lumber Company, they would execute their notes to the company for the amount, with interest, and in nearly all instances shortly afterwards they sold the timber standing on the land to the Martin-Alexander Lumber Company by a written contract, and the notes were canceled. By the terms of the contract the Martin-Alexander Lumber Company was to pay 50 cents a thousand stumpage for all the timber cut from the land, and the amount which had been loaned by it to enter the land was treated as

purchase money advanced on the timber, and, if the value of the timber exceeded the value of the money advanced, with interest, the seller was to get the difference. In some cases the entrymen declined outright to sell at all to the Martin-Alexander Lumber Company, and finally sold to other parties after the patents were issued. In such cases the person purchasing from the entryman was an agent for the Detroit Timber & Lumber Company, and took the deeds in his own name, but gave credit to the entryman for the moneys advanced by the Martin-Alexander Lumber Company to the entryman, and the lands were subsequently conveyed to the Detroit Timber & Lumber Company, which had succeeded the Martin-Alexander Lumber Company by purchase of all its rights and interests in connection with mill plant and lands. Before any of these lands were entered, the proof shows that Copeland took the law, and he and Martin, and perhaps Alexander, sat down and went over it together, and Copeland explained to them the construction placed upon the law by the land officers, informing them that the applicant would have to make affidavit to the requirements of the statute, and show that he did not make the purchase on speculation, but in good faith; with the intention of appropriating it to his own use and benefit; and that he did not, directly or indirectly, make any contract or agreement in any way or manner with any person or persons whatsoever by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any other person except himself. Both Martin and Alexander knew

that Copeland had examined and understood the law and Copeland had taken advice as to its construction, and imparted that information to Martin and Alexander. He also imparted the same information to the entrymen, and each and all of the entrymen not only made affidavit at the land office, as required by the statute, but nearly all of them, being called by the plaintiff, have testified and corroborated that affidavit by positive testimony, which is part of the record in this case. Alexander and Copeland have also testified substantially to the same facts, and have positively and emphatically denied that there was any agreement or understanding, expressed or implied, prior to the issuance of the final receipts by the land office, whereby the Martin-Alexander Lumber Company should have any interest of any kind whatsoever in regard to the lands or timber on them in controversy; and there is no proof by any witness to the contrary. There are many circumstances in connection with the transaction which are suspicious in their nature, and tend to create the belief that the Martin-Alexander Lumber Company understood, were satisfied, felt sure that the lands would ultimately come into their possession. I have no doubt in my own mind, from all the facts, that it did so believe, and, if it had not so believed, that it would not have advanced the money to the entrymen in order that they might enter the land. As intelligent business men, Martin and Alexander knew that at that time there was no one else who could cut and use the timber but themselves; they knew that the lands were not homesteads, nor susceptible of being made homesteads; they knew that when

the patents were issued the lands were not exempt from execution; they knew, if necessary, they could sue upon the notes and recover judgment and sell the land; they knew it was to the interest of the men who had entered them to sell the timber, and they knew that in making the entry the object of the parties was to sell the timber because the land was not fit for cultivation; they knew that the entrymen expected to get more from the timber than the land was worth, because Copeland had told the entrymen about what amount of timber was on the land, and what could be gotten for it at that time, and that more could be realized from the timber than it would take to enter the land; they knew their company could afford to pay more for the timber because their mill was already located in closer proximity to it than any other mill; they knew also that the persons to whom they had loaned the money were honest men, and would desire to pay their debts; they knew, in all reason, that they had not other resources out of which to pay back the borrowed money; they knew, therefore, that in all probability they would ultimately get the timber, and that they could purchase it without any fair competition with others.

Assuming all these things to be true, and that their motive for lending the money and assisting in making the entries was with the hope of ultimately getting the timber, which one of these acts is either violative of the letter or spirit of the timber and stone act?

The court then quotes copiously from the Budd case and the Maxwell Land-Grant case and states that the

facts in the case then in discussion are no stronger in favor of the Government than they were in the Budd case, and in his opinion they were not so strong.

For the reasons thus given the bill was dismissed for the want of equity.

It will be noted that in the Detroit case just quoted that the *entrymen* were made *codefendants*, and that each entryman answered, *denying* specifically the allegations in the bill in so far as it alleged any fraudulent conduct on their part, and each entryman *affirmed* that the *affidavits* which they had made at the land office were true. The *companies* also *answered, denying* the *allegations of fraud*. Each entryman not only made an affidavit to the land office, as required by the law, but nearly all of them were called by the plaintiff, testified, and corroborated that affidavit by positive testimony; that Alexander and Copeland testified substantially to the same facts as did the entrymen and positively and emphatically denied that there was any agreement or understanding, expressed or implied, prior to the issuance of the final receipts by the land office; that Copeland knew the proper construction to be placed upon the timber and stone act and explained the same to the entrymen; that the Martin-Alexander Company furnished the money for the entrymen to initiate the entries and to make proof, but that a note was taken for the full amount with interest at 8 per cent at the time of final proof; and a number of the entrymen were solicited by Copeland, while others sought him. Copeland explained to the entrymen the amount of timber on the land and what could be gotten for it at that

time, and Copeland also told the entrymen that they could sell the land after patents were issued.

The Circuit Court of Appeals in deciding the same case, 131 Fed. Rep., 668 & 679, makes practically the same statement of facts, adding however that most of the entrymen were poor and unable to pay for the land without borrowing the money; that Copeland assisted them to select the land and to make their entries. They made two journeys to the local land office, one to make their applications and one to pay for the land and obtain their final receipts. The Martin Company paid their traveling expenses upon these trips and the fees for the publication of the notices required by the statute; that 25 of the 44 patentees were employees of the Martin Company and 10 were wives of employees; that when the time came to pay for the lands the company loaned to each one of the patentees the amount required for that purpose, and he or his companion or agent paid for the land and obtained the final receipt; that within a few days after the final receipt was obtained he made a promissory note for the amount he had paid for the land and interest at 8 per cent per annum; that *he then made a written agreement* with the Martin Company that in consideration of \$1 and of the covenants recited therein he "has bargained, sold, and conveyed" unto the company all the timber and trees upon the land, etc.

Circuit Judge Sanborn in announcing the decision of the court, after stating that the Detroit Timber and Lumber Co. was an innocent purchaser as to the lands

conveyed to it (131 Fed. Rep., 679), said as to the entries remaining in the original applicants:

There remain 17 tracts of land the title to which still stands in the original applicants and patentees * * *. The evidence in this *record has convinced, not that these applicants made any agreements by which the title which they might acquire should inure to the benefit of any person except themselves*, but that each one of them applied to enter the lands he or she *obtained on speculation for the use and benefit of the Martin-Alexander Lumber Company and not in good faith to appropriate it to his or her own exclusive benefit*. The salient facts which were proved in this case and which have forced our minds to this conclusion appear in the statement which precedes this opinion, and no good purpose would be subserved by restating them here.

The decree below is accordingly reversed.

Although all the entrymen, being called as witnesses, denied that any agreements had been made for the transfer of the lands to the lumber company, the Supreme Court, affirming the judgment of the Circuit Court of Appeals, found that the transaction of itself proved the existence of such agreements. (*United States v. Detroit Lumber Company*, 200 U. S., 321.) The opinion on these points reads:

The entire management of these entries was in the hands of an agent of the Martin-Alexander Company. It furnished the moneys, both for the purchase prices and all expenses, and it is not easy to believe that it did all this on a mere expectation that after the entries had been made it could purchase the timber. It is a

much more reasonable conclusion that it had an understanding with the parties making the entries respecting purchases and prices. It is quite likely that the entrymen were not conscious of wronging the Government, and thought that if it received the full price demanded, that was enough. The testimony of one witness suggests at least that they may have been advised that there was no contract unless it was in writing, and that hence they could conscientiously take the oath required in connection with an entry. So, without casting any imputation of intentional perjury on those parties, we agree with the Court of Appeals that the testimony points strongly to the fact that the entries were in pursuance of an understanding or agreement with the Martin-Alexander Company, that, as it was advancing all the money, the entrymen should convey to it the standing timber at a fixed price.

See also *U. S. v. Smith et al.*, 181 Fed. Rep., 545.

These cases, although perhaps not of controlling authority upon the questions of fact involved herein, show in what manner similar questions of fact have been determined, and constitute monuments for judicial guidance in dealing with present conditions. And it is submitted that, upon this evidence, and with proper respect for the precedents cited, it should be found that the entries herein involved were procured by, and made in pursuance of, such agreements as are prohibited by the act of 1878, or such understandings as amount to such agreements and are equally within the prohibition of the statute.

One of the facts appealing to the Supreme Court in the Detroit Timber & Lumber Company Case was that the Martin-Alexander Company furnished the entrymen the money with which to make proof and pay for the land. As this money was furnished at the time of final proof and was a forceful element in inclining the Supreme Court to the opinion that the entries were made pursuant to antecedent agreements with the Martin-Alexander Company, and for that reason ordered that the patents issued thereon should be canceled, it would seem that there could be no question of the admissibility of such evidence and that it should be weighed with all the other evidence in the cases.

DECISIONS UPON CASES ARISING UNDER THE TIMBER AND
STONE LAW.

United States v. Budd, 144 U. S., 154.

United States v. Clark, 138 Fed., 294.

United States v. Clark, 200 U. S., 601.

United States v. Barber Lumber Co., 194 Fed., 24.

United States v. Detroit Lumber Co., 200 U. S.

The extent to which a person or corporation desiring to acquire large quantities of the Government timberlands may go, without violating the provisions of the timber land law is announced in the Budd case; and in almost every case arising since the Budd case was decided, in which a violation of the timber land act has been charged, that case has been cited and quoted from. Mr. Justice Brewer, in announcing the decision, said:

The particular charge is, that Budd, before his application, had unlawfully and fraudulently made an agreement with his codefendant, Montgomery, by which the title he was to acquire from the United States should inure to the benefit of such codefendant. * * * The act does not in any respect limit the domain which the purchaser has over the land after it is purchased from the Government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If, when the title passed from the Government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfactory. Montgomery might rightfully go or send into that vicinity and make known generally, or to

individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the Government; and any person knowing of that fact might rightfully go to the Land Office and make application to purchase a tract from the Government, and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement prior to the purchase from the Government—point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law. (144 U. S., 162, 163.)

This court, in *United States v. Barber Lumber Co.*, 194 Fed., 24, 30, 31, 33, said:

The decision in the present case is ruled by the legal principles announced in the Budd case and in the Clark case (*U. S. v. Budd*, 144 U. S., 154; *U. S. v. Clark*, 138 Fed., 294; and *U. S. v. Clark*, 200 U. S., 601). Those decisions are authority for the proposition that a person or corporation desiring to acquire title to a large body of timber lands of the United States under the Timber and Stone act may express that desire to another, and may enter into an agreement with him to buy the lands upon his obtaining title thereto, may loan him the money with which to acquire title, and may inspect and select the lands, and that such person or corporation is not bound to inquire into the methods by which the other party to the contract acquired title and is not chargeable with knowledge of any fraud under the land laws that he may resort to, and that in taking titles based upon the issuance of final receipts to the entry-

men without actual knowledge of such fraud or of facts sufficient to put him upon inquiry, such person or corporation is an innocent purchaser of the land.

After referring to the contract between Steunenberg, and Barber and Moon, and the fact that some of the land was to be acquired by scrip, the court continuing said—assuming that the title was to be obtained by entries under the Timber and Stone act—

he (Steunenberg) could rightfully go into the Idaho timber country and make known generally his willingness to buy timber lands at a price in excess of that which it would cost to obtain it from the Government, and persons knowing of that fact might rightfully go to the Land Office and make application, and purchase the timber tract for the purpose of selling it to him (pp. 31, 32, *ib.*).

The court, referring to the Crooked River entries, suggested that there is evidence tending to prove that these entries which were subsequently acquired by the defendants may have been made in violation of the provisions of the timber and stone act;

but the decided weight of the testimony of such illegal act, if such there were, was induced by the locators, Downs and Wells, for their own individual advantage, and not at the instance of Barber or Moon or the appellee or to their knowledge (p. 33, *ib.*).

And again in the statements of the case, the court said:

There is no evidence that during the time of these transactions, either Barber, Moon, or the

appellee had any dealings or correspondence with Kinkaid, Pritchard, Wells, Downs, Sweet, or Martin (p. 29, ib.).

In *United States v. Clark*, 200 U. S., 601, 607, 608. the court said:

We may assume for the purposes of decision, as did the Circuit Court of Appeals, that the original frauds are made out, although there is a great amount of testimony to good faith. * * * There is nothing sufficient to show that Clark had actual knowledge of the arrangement by which Cobban got the land. The allegation that Cobban was Clark's agent in the purchase wholly breaks down. Clark was at a distance. He dealt as a purchaser with Cobban, and paid him the market price, and a substantial profit even on the Government's calculation.

The Supreme Court affirmed the decision of this court and held that Clark was an innocent purchaser.

Of the reasons stated by this court in the Barber Lumber Company case, and by the Supreme Court in the Clark case, for holding that said appellees were innocent purchasers, were that Barber and Moon and Clark lived at a distance from the scenes of the unlawful operations; that no agency existed between Clark and Cobban and that Clark dealt as a purchaser with Cobban; and that neither Barber nor Moon, on behalf of themselves or the Barber Lumber Company, had any correspondence or dealings with Downs or Wells, who dealt directly with the entrymen in procuring the entries to be unlawfully made and in locating them on the lands,—a very different situation than in

the present case, wherein Kester and Kettenbach were on the ground all the time. They conferred with their agents or conspirators, Robnett, Dwyer, Emory and Colby, O'Keefe and Steffey, almost daily in regard to entries to be made or that were making, in the back in which they were officers, and came in contact with many of the entrymen under the conditions hereinbefore referred to, and of which further mention will be made.

The language of the Budd case is very broad, but it can not be construed to mean that a fraud upon the timber land laws is impossible of proof so long as the parties to the fraud decline to admit it, or unless a number of persons have overheard the terms of the agreements discussed between said parties, or unless some one produces a copy of the agreement made by them. To say that a person might go or send into a given vicinity, and make known generally or to individuals a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the Government, and any person knowing of that fact might rightfully go to the land office and make application to purchase a tract from the Government, is in effect a very different situation from that in which a person desiring to acquire large tracts of public timberland seeks out a number of impecunious persons, and he or his agents makes known to them his wishes in that regard, and states that he is willing to purchase the timber claims at a price in excess of the amount at which they can purchase the claims from the Government, and that if necessary he will either furnish or lend them the money for that purpose. In such cir-

cumstances, if the person or persons sought out immediately thereafter, went to the land office and filed upon timber claims and were furnished or loaned the money or a part thereof for that purpose, or to perfect the entries, by the person who made the suggestion, and that soon after making proof they should convey the title to the claims so acquired to him, it would seem that notwithstanding all of said persons should deny that they had a prior agreement or understanding as to what they should do with the claims after proof, the court would be justified in holding that the entries were made pursuant to a prior agreement that they would do just what was done.

SPECULATION.

TO ENTER A TIMBER CLAIM ON SPECULATION IS A FRAUD
UPON THE TIMBER AND STONE LAW.

The Supreme Court in the Budd case, in referring to the timber and stone act, said that—

All that it denounces is a prior agreement, the acting for another in the purchase.

The question as to whether Budd had entered the claim then in suit on speculation was not raised; and the court had just before making the remark above quoted said:

The particular charge is, that Budd before his application, had unlawfully and fraudulently made an agreement with his codefendant, Montgomery, by which the title he was to acquire from the United States should inure to the benefit of such codefendant,

The Supreme Court has repeatedly held, and it is unnecessary to cite the cases here, that the courts are not bound by expressions in opinions where the questions to which the statements or expressions relate were not raised or argued in the case in which they were made, if a determination of the questions was not necessary in reaching a decision in the case.

In order that it may be made plain that Congress in passing the timber and stone act not merely intended that the public timber lands should not be taken up pursuant to a prior agreement but also that they should not be entered for the purpose of speculation, we shall point to the events contemporaneous with the passage of that Act, and the matters that were pressed upon the attention of Congress in connection therewith.

While the statements made and the opinions advanced by the promoters of an act of Congress are inadmissible as bearing upon its construction, yet reference to the proceedings of each House of Congress may properly be made to inform the courts of the exigencies that required the passage of the act and the evils sought to be guarded against. (*American Ndt & Twine Co. v. Worthington*, 141 U. S., 473.)

In the case of the *Holy Trinity Church v. The United States*, 143 U. S., 463, Mr. Justice Brewer, in announcing the decision of the court, said:

Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at the contemporaneous events, the situation as it exists, and as it was pressed upon the attention of the legislative body.

In *Dunlap v. United States*, 173 U. S., 75, the court said:

Without questioning the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body (*U. S. v. Trans-Missouri Freight Association*, 166 U. S., 290, 318), it is nevertheless interesting to know that efforts were made in the Senate to amend the bill by the additions of sections which, while making alcohol used in the arts free from the tax, sought to secure the Government from fraud by provisions for the methylating of such spirits so as to render them unfit for use as a beverage; that these proposed amendments were rejected (26 Cong. Rec., 6925, 6936); and that subsequently section 61 was adopted as an amendment, it being urged in its support that, if the Secretary of the Treasury and the Commissioner of Internal Revenue think they can not adopt any regulations which will prevent fraud, then nothing will be done under it; but if they conclude they can adopt such regulations as will prevent fraud in the use of alcohol in the manufactures or the arts, then there will be relief under it. (26 Cong. Rec., p. 6985.)

During the Forty-third, Forty-fourth, and Forty-fifth Congresses a number of bills were introduced in either Houses of Congress, having for their purpose the disposition of the public timber lands in Oregon, California, Washington, and the Territories, and some of them included the timber lands in other States. These bills were very similar, and in so far as they may have a bearing upon the question now under consideration they were the same, except in the instances which we shall mention.

The bills are as follows:

H. R. bill No. 410, introduced by Mr. Page at the first session of the Forty-third Congress, December 8, 1873.

H. R. bill No. 4149, reported by Mr. Bradley December 23, 1874, as a substitute for H. R. bill No. 410. (Vol. 3, p. 229, Cong. Rec.) This bill passed the House February 22, 1875, and the following day in the Senate was referred to the Senate Committee on Public Lands, but failed of passage. (Vol. 3, p. 1617, Cong. Rec.)

H. R. bill No. 1191 was introduced by Mr. Saylor (of Oregon) January 17, 1876, at the first session of the Forty-fourth Congress, and referred to the Committee on Public Lands of the House (vol. 4, p. 443, Cong. Rec.), and was reported back with amendments and recommitted March 15, 1876. (Vol. 4, p. 1726, Cong. Rec.)

H. R. bill No. 660 was introduced by Mr. Maginnis (of Montana) at the first session of the Forty-fourth Congress, January 6, 1876, and referred to the Committee on Public Lands. (Vol. 4, p. 303, Cong. Rec.)

H. R. bill No. 141 was introduced by Mr. Page (of California) at first session of the Forty-fourth Congress, December 14, 1875, and referred back to the Committee on Public Lands. (Vol. 4, p. 212, Cong. Rec.)

S. bill No. 6 was introduced by Mr. Kelly (of Oregon) at the first session of the Forty-fourth Congress, December 8, 1875; read twice and referred to the Committee on Public Lands. (Vol. 4, pp. 186, 187.) The bill was reported back to the Senate without amendments February 8, 1876. (Vol. 4, p. 934, Cong.

Rec.) This bill was debated, amended and passed the Senate. (Vol. 4, pp. 934, 1100 to 1107, 1142 to 1146, 1146 to 1191, Cong. Rec.)

All of said bills require that the applicant should make affidavit at the land office and swear, among other things:

That he does not apply to purchase the same *on speculation*, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself.

H. R. bill No. 1191 and S. bill No. 6 require that the entryman, as a part of his application, should swear that he was applying to purchase the land in good faith to appropriate it to his own exclusive use and benefit, *and not for sale*, in addition to the matter above quoted as required in the other bills, as a part of the application.

Mr. Kelly, of the Committee on Public Lands of the Senate, in presenting Senate bill No. 6, February 16, 1876, for consideration, said:

I will simply state that this bill is a copy of one that passed the House of Representatives at the last session of Congress. It was then well considered by the House committee and a printed report made upon it. It came to the Senate too late for consideration at the last session. At an early day in this session it was introduced by me, referred to the Committee on Public Lands of the Senate, and received a full consideration before

that committee at two or three meetings, and I was instructed by that committee to report it back without amendments and recommend its passage. * * *

He then stated that it was not the purpose of the bill to abrogate either the preemption law or the homestead law, and continuing, said:

It has been too frequently the case that persons desiring to cut timber on the public lands will take either a preemption or a homestead claim, go upon it, cut down and sell the timber, and never pay for or enter the land. The purpose of this bill is to do away with these trespasses upon the public domain, so that persons may acquire title without residence, and have an interest in the timber lands, and protect them from destruction and protect them from trespass.

* * * The Government should receive something for its lands; there is no reason why it should not; and the committee, after careful consideration, thought that many persons, rather than go upon a tract of land as a homestead and reside upon it five years, would prefer to pay \$2.50 per acre; and in that way it will make an honest business, and people will get the timber honestly, instead of cutting it from the public land as trespass.

There is another reason, as I said, many persons owning claims in the vicinity of the timberlands trespass upon them, cut down the timber, and take it for the purpose of fencing and building, removing it from the public lands. The object of this bill is that they may acquire the right to this timber by purchasing the land.

Then they will have an interest in protecting the timber, instead of destroying it. * * *

I may say further that in the mining countries, where it is necessary to have timber for mining purposes to smelt the ores, the timber is removed from the public lands now by any person who may choose to take it. It may be said that they should be punished for their trespass. They may be, but they never are. In fact it becomes a necessity to have timber to smelt the ores and to conduct mining operations wherever they are carried on; and to say that timber shall not be taken is to say that we simply mean to shut down on mining operations forever. (Vol. 4, Cong. Rec., p. 1100.)

Senator McMillan then proposed an amendment to section 2 to the effect that deponent shall swear that he has not executed any mortgage or other instrument upon said land by which the title thereto may be vested in any other person. This amendment was defeated. In discussing it, however, Mr. Sargent said:

I think the friends of the bill have no objection to the amendment proposed by the Senator from Minnesota; I certainly have none myself *and if the machinery of the bill can in any way be guarded so that speculators can not take advantage of this law if we pass it, I shall be very glad to have that done.* Nearly the whole bill is taken up with provisions *hedging in opportunities for speculators to avail themselves of its provisions to acquire large tracts of land under it.* * * * This is hedged around by oaths and papers and documents in every form which careful ingenuity can provide. If any Senator, as the Senator from Minnesota has proposed, can devise lan-

guage which will still more guard that portion of the bill we would like it to be guarded, because, while I would desire that there be an opportunity for our people honestly to carry on this business, *I do not wish this land to be absorbed by speculators* * * *.

Mr. HOWE. Why not provide that these lands shall be offered at public sale?

Mr. SARGENT. Because then you give an opportunity to speculators. (Vol. 4, p. 1101, Cong. Rec.)

* * * * *

Mr. SARGENT. Will the Senator from Illinois allow me a moment? I should like to say to the chairman of the committee that the committee did endeavor to guard it, and my impression is that the bill does guard it; or, if it does not, I certainly concur with the suggestion that it should be made to do. The affidavit which the enterer is required to make says, among other things, that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and not for sale. * * *

That is to say, there are two things: In the first place, *no speculation whatever* moves him in this matter, and, in the next place, the title is entirely for his own use. But if the Senator is not satisfied with that language, I will say to him, for the sake of the people of my own State, to propose an amendment which will cover this. I think this does. (Vol. 4, p. 1103, Cong. Rec.)

Senator Sherman, who desired that there be no restriction whatever upon the sale of the timber lands, being of the opinion that they should be sold for the

purposes of revenue, urged that the bill as drawn would not defend it against speculators. He said:

A speculator can ride through this bill with a coach and four without any difficulty. A speculator can organize a system under the terms of this bill by which he could buy for a corporation every quarter section of land in that timber country that he desired to purchase. How? He could send its agents all through this timberland to select favorite quarter sections; each agent would go and make the affidavit prescribed by this bill, and even before he started on his journey he would make a contract with the corporation or with a lumber company to sell the lumber growing upon that land. He could make the oath without even swearing falsely. Now no man can gain possession of a quarter section of this timber country except by swearing falsely. * * * If this land is open for settlement under the provisions of this bill, a man could very easily say that he would not sell the title of the land, the ownership of the land, the fee of the land, or any other term we may use, and yet he may make a contract to cut and sell the stumpage. * * * That would be sufficient for the adventurous proprietor of a saw-mill to cut every stick of timber upon it and thus evade the provisions of the law. (Vol. 4, p. 1105, Cong. Rec.)

Though the suggestion of Mr. Sherman that all restrictions be taken out of the bill and that the timberland be sold for the purposes of revenue was not followed, in order to safeguard the measure against the danger of the land being acquired by speculators, as pointed out by Mr. Sherman, Mr. Sargent offered the

following amendment: To insert after the words "United States," in line 19, in section 2, the following: "or any right in said land or the timber thereon," so that it will read:

and that he has not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States, or any right in said land or the timber thereon, should inure, in whole or in part, to the benefit of any person except himself. (Vol. 4, p. 1145, Cong. Rec.)

The amendment was agreed to (vol. 4, p. 1187), and the bill passed the Senate February 21, 1876 (p. 1191).

In the particulars mentioned, Senate bill No. 6 just referred to is the same bill that in the next session of Congress was known as Senate bill No. 926, with the exception that in the latter the entryman is not required to swear as part of his application that he does not intend to sell the land. Senate bill No. 926 passed both Houses at the second session of the Forty-fifth Congress and is the present timber and stone act. It was introduced by Mr. Sargent, of California, and referred to the Committee on Public Lands. (Vol. 7, p. 1753, Cong. Rec.) It was reported back by Mr. Booth from the Committee on Public Lands with amendments (vol. 7, p. 2187, Cong. Rec.) and passed the Senate April 25, 1878 (vol. 7, p. 2842). It was reported to the House Committee on Public Lands (p. 2929), corrections were made, and passed the House May 11, 1878 (p. 3388). The Senate concurred in the House amendments and the bill was examined, signed,

and approved by the President June 3, 1878. (Vol. 7, pp. 3450, 3533, 3560, 4017.)

Prior to the passage of the timber and stone act persons could not enter the public lands except under the homestead law and the preemption law, and if they entered lands under either of these laws, it was necessary that they should reside upon them, and they had to swear that they had entered the same for a home and for settlement and cultivation. It would be impossible for persons to cultivate the lands in portions of the timber regions in California and Oregon, and therefore there was no way for them to acquire the timberlands lawfully. The only way in which persons could secure the timber in those States for domestic purposes and for use in mines was to steal it. If they entered the land under the preemption law or the homestead law, they would of necessity have to perjure themselves in the affidavit they were required to make upon entering; and if they went upon the land and cut the timber without entering the same under either of these laws, they would be subject to a conviction for trespass and to a judgment in a civil suit for the value of the timber. So, in order that the settlers in the western country who had need for timber could lawfully obtain the same, Congress passed the timber and stone act and at the same time endeavored, as far as possible, to protect the public timber lands from being entered upon speculation or for the benefit of speculators.

In *United States v. Detroit Lumber Company*, 200 U. S., 321, the Circuit Court of Appeals held that the claims remaining in the original entrymen were *entered on speculation* for the use and benefit of the Martin-

Alexander Lumber Company and not in good faith to appropriate it to his or her own exclusive use and benefit. The Supreme Court, in affirming the judgment of the Circuit Court of Appeals in said case, found that the entries were made pursuant to agreements, but this can in no way be construed to mean that the statute may not be violated as readily by entering land thereunder upon speculation as well as pursuant to a prior agreement.

Hafemann v. Gross, 199 U. S., 342, 349, was a suit to enforce a contract for a portion of the proceeds of a sale of land entered under the preemption law, the agreement having been entered into prior to entry; that law required the preemptor to make affidavit as part of his application similar to that required of a person entering public land under the timber and stone act. In the dissenting opinion of Mr. Justice White, in which Mr. Justice McKenna and Mr. Justice Holmes concurred, appears the following:

The preemptor must swear "that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use." Could this statement have been truthfully made in view of the agreement by which the preemptor bound himself after his purchase, if he sold the land, to pay to the other parties to the contract one-fourth part of the purchase price?

This statement that it would be a fraud upon the preemption law to enter lands under the same on speculation is not in conflict with the views expressed in the majority opinion. The majority reached their conclu-

sion by finding that under the agreement entered into by the preemptor he was in no way bound to sell his claim; and though he made entry in 1890 and a patent was issued for the claim in December, 1891, he did not sell the claim until July, 1902, more than ten years after he had obtained patent therefor.

VALID ENTRIES.

We shall not contend that there is sufficient evidence to justify the cancellation of the patents to the entries of John W. Killinger, William E. Helkenberg, Fred E. Justice, George W. Harrington, and Geary Vanartsdalen.

INVALID ENTRIES.

The evidence hereinbefore set out shows that all of the claims, with the exception of the five above mentioned, were entered in fraud of the statute. That evidence shows that each entryman had an agreement, either expressed or implied, prior to initiating his entry, with defendants or their agents, as to the disposition to be made of his claim after final proof; and the testimony of each entryman, brought out in most cases on cross-examination, proves beyond question that all of said entrymen also made their entries on speculation.

ENTRIES HELD BY KESTER AND KETTENBACH.

The titles to all of the entries involved in cases No. 2209 and No. 2211 are vested either in Kester and Kettenbach, or Kester or Kettenbach. They are the entries of Maris (p. 44, *ib.*), Little (p. 63, *ib.*), Harrington (p. 67, *ib.*), Pierce, (p. 70, *ib.*), Bashor (p. 72, *ib.*),

F. M. Long (p. 74, *ib.*), J. H. Long (p. 77, *ib.*), B. F. Long (p. 79, *ib.*), Ferris (p. 85, *ib.*), Robinson (p. 89, *ib.*), of the Robnett group; and of Charles W. Taylor (p. 135, *ib.*), Jackson O'Keefe (p. 133, *ib.*), Edgar J. Taylor (p. 141, *ib.*), Prentice (p. 139, *ib.*), and Dammarell (p. 143, *ib.*), of the O'Keefe group in case No. 2209; and of Charles S. Myers (p. 210, *ib.*), Jannie Myers (p. 212, *ib.*), Mary A. Loney (p. 214, *ib.*), Effie A. Jolly (p. 216, *ib.*), Charles E. Loney (p. 220, *ib.*), James T. Jolly (p. 222, *ib.*), Clinton E. Perkins (p. 225, *ib.*), Frank J. Bonney (p. 227, *ib.*), of the Steffey group in case No. 2211. The number set out opposite each name refers to the page in this brief at which the evidence relative to each particular entry is mentioned.

The District Court held that the Steffey entries were made pursuant to prior agreements between Steffey and the entrymen, but that Kester and Kettenbach acquired and hold the titles thereto as innocent purchasers; that the Maris entry was made in accordance with an agreement between the entrywoman and Robnett in violation of law, but that Kester and Kettenbach were not aware of the illegal agreement and that they purchased the claims in good faith; and as to the other entries, that the evidence is not sufficient to sustain the charge that they were made in violation of law.

INNOCENT PURCHASER.

The District Court held that the defendants Kester and Kettenbach were purchasers in good faith and for value of the entries forming the Steffey group just mentioned. We will now discuss the reasons assigned by

the court for reaching that conclusion. In the opinion the court states in effect that the only evidence that would tend to show a conspiracy between Kester, Kettenbach, Dwyer, and Steffey, or that Steffey, in procuring the entries to be unlawfully made, was acting as the agent of Kester, Kettenbach, and Dwyer, is the testimony of Steffey: that Steffey's testimony is denied by Kester, Kettenbach, and Dwyer and that Steffey's credibility is impeached by the fact that he is an accomplice and that he suborned perjury and was guilty of the moral obliquity of perjury in procuring entrymen to swear falsely at final proof.

In our introductory statement of the evidence (p. 5, *ib.*) we have discussed the weight that should be given the testimony of the more important witnesses in the cases, and it seems unnecessary to repeat it. A reading of the testimony in connection with the various entries composing the Steffey group (pp. 203 to 235 *ib.*) will show plainly that Steffey was acting in concert with Kester, Kettenbach, and Dwyer as their coconspirator or as their agent.

There is no question that Kester, Kettenbach, and Dwyer were acting as coconspirators in attempting to induce Hutchins, Pfeffley, and Roos to enter claims for their use and benefit in 1902 and 1903; that the same relations existed between them in procuring the entries to be made for their use and benefit of the claims of Lambdin and Shaeffer in 1902; and in inducing Cornell to make an entry for them in June, 1903; and also in procuring the entry of Guy Wilson and Frances Justice, (which the court held for cancellation), and the other persons forming the O'Keefe and Kester, Kettenbach

and Dwyer groups in the spring of 1904; and in instituting the contest herein mentioned for their use and benefit. The court held that Dwyer, in procuring the entry to be made of the Wilson claim, was acting as the agent of Kester and Kettenbach, and that they were therefore charged with notice (p. 286). It having been established that said defendants in 1902 formed the conspiracy or agency mentioned, all the evidence shows that the same relations continued to exist between them until June, 1904, the date of the agency of Dwyer spoken of by the court, and from then down to the making of the last entry in these suits. Moreover there is no other evidence than that of the defendants themselves that they were not acting in concert until the last entry in the suits was acquired. The first entry that Steffey procured to be made was that of Charles Myers, and Steffey testified relative to the agreement he had with Dwyer prior to the making of the entry, as well as to the agreement he had with the entryman. The court finds that Steffey contradicted himself as to the date that he talked with Dwyer relative to the claims forming his group, and reasons from that contradiction that, according to Steffey's testimony, his arrangement with Dwyer relative to said claims was not until after all of the entrymen but two had initiated their entries and were about to make their final proof. Though Steffey was unable to remember the exact dates, he testified very plainly that the agreement he had with Dwyer was before any of the entrymen had as much as gone to view the claims and quite a time before they initiated their entries, and this is corroborated by all the facts and circumstances herein set out relative to said entries,

and by the further fact that the first entry which Steffey procured to be made—that of Charles Myers in the latter part of 1905—was upon one of the homesteads that Dwyer had contested, and Dwyer furnished the relinquishment at the time the entry was made. The court bases its finding upon the following evidence taken from the cross-examination of Steffey:

Q. Now, what was the conversation you had with Dwyer regarding these Myers and Bonney and Jolley claims you speak of, the first conversation you had regarding it?

A. I told him about these lands that I had cruised out, and he told me to get somebody and locate on them and tell them we would give them \$200 after they had proved up on them.

Q. And that is all that was said?

A. Well, yes; in particular about that.

Q. Now, when was that?

A. I couldn't say when it was; the exact date.

Q. Then what did you do?

A. I went up and located them.

Q. Dwyer told you that he would give them \$200 over and above expenses?

A. Yes, sir.

Q. Had Dwyer gone and looked at the claims?

A. Some of them he did.

Q. What claims did he go to look at?

A. He went to look at Mrs. Loney's and Mrs. Jolley's claims.

Q. Did he know that Mrs. Loney and Mrs. Jolley were going to take those claims?

A. I think they had already taken them when he looked at them.

Q. Hadn't they already filed on them?

A. Yes, sir.

Q. Hadn't they made their final proof too?

A. I don't think they had.

Q. To refresh your recollection, wasn't it after they made final proof and just before they made the deeds that Dwyer went up and looked at them?

A. Possibly, but I don't recollect it. (Pp. 356, 357.)

The court says that it is clear from this testimony, if taken to be true, that the conversation relied upon as constituting the agreement between Dwyer and Steffey did not take place until after Dwyer had looked at the claims of Mrs. Loney and Mrs. Jolley, and that Dwyer had not looked at these claims until after they were filed upon, and that only one claim was entered after the filing of these claims. The court seems to have failed to put the proper construction on the language quoted. Steffey testified very frankly both on direct and cross examination as to all matters concerning which he was interrogated, and it is apparent that he was frank in giving the testimony just quoted. Steffey is illiterate and somewhat dogged, and a careful reading of the quotation shows that the construction placed upon it is not justified. From the testimony that precedes the first question quoted, it will be seen that counsel for the defendants had been inquiring about other entrymen that Steffey had located with which it is not claimed that any of the defendants had anything to do. Counsel then asked: "Now, what was the conversation you had with Dwyer regarding these Myers, Bonney, and Jolley claims you speak of.

the first conversation you had regarding it?"—having reference to the entire Steffey group (p. 1824). Steffey then states what he told Dwyer about the persons he could locate on the claims, meaning the whole group, and says that after his conversation with Dwyer he took the persons named to the claims and located them. The next question asked by counsel for the defense has no reference in point of time to the four questions that precede it. It does not begin "Then did Dwyer tell you," etc., but reads:

Q. Dwyer told you that he would give them \$200 over and above expenses?

A. Yes, sir.

The witness understood that he was being inquired of as to the arrangement he had with Dwyer at the first conversation and what Dwyer was to allow for the claims, and the language of the question would not indicate that the defense was attempting to fix the date of the conversation. Then the next questions:

Q. Had Dwyer gone to look at the claims?

A. Some of them he did.

Q. What claims did he go to look at?

A. He went to look at Mrs. Loney's and Mrs. Jolley's claims.

Q. Did he know that Mrs. Jolly and Mrs. Loney were going to take those claims?

A. I think they had already taken them when he looked at them.

Q. Hadn't they already filed on them?

A. Yes, sir.

It is apparent that the witness understood that he was asked "Did Dwyer go to look at the claims?" for he answered "Some of them he did," and not, that he had.

It is clear from the quotation set out that the witness misunderstood several of the questions asked him, as is indicated by his answers; and further, that notwithstanding he had testified a number of times before in the course of his direct and cross examination that his conversation with Dwyer was before any of the entry-men had filed, he makes no attempt here to hedge or to quibble to shift the dates.

There would be nothing unusual in Dwyer making the agreement with Steffey, that the latter testified to, before he had gone to the lands in company with Steffey, because Steffey had worked for him, and he knew that Steffey knew as much about the quantity and quality of the timber upon the lands as he did. Moreover, as has been said, Dwyer had surely been upon the Myers claim, the first of the group entered, because he contested the homestead upon which the timber and stone entry was filed by Myers; and that entry, as well as some of the others forming the group, are in townships that Steffey had cruised the year before in assisting to make selections for the State. It is safe to say that at that time Dwyer had been over and cruised every acre of timber land in the State of Idaho.

On redirect examination Steffey testified as follows:

Q. Now, there were two claims that you mentioned that you and Mr. Dwyer went to see some time before final proof. Do you remember which they were?

A. Yes, sir.

Q. Which were they?

A. Mrs. Loney's and Mrs. Jolley's claims.

Q. Now, had you had any talk with Mr. Dwyer about these claims before the entrymen were located?

A. Yes.

Q. Did you tell him anything about them?

A. Yes, sir.

Q. What did you tell him?

A. I told him that they were rather indifferent claims; that they were at that time not exceptionally good locations and described them as near as I could; and finally he told me to locate them anyway (p. 1871).

Again the court comments on the testimony of Chapman, who testified that he thought that Steffey's overdrafts at one time ran up between \$2,000 and \$3,000, and reasons from that, that if he were using the funds of the bank by means of overdrafts purely for Kester and Kettenbach's timber operations, there would be no occasion in which he would require more than \$1,500 to furnish the entrymen the money with which to make proof. The court bases its deduction on what the witness thought was the approximate amount of the overdrafts, and reasons from that with the exactness that would be warranted if Steffey's bank account had been introduced in evidence (pp. 359 to 360).

The court further said:

No explanation is furnished as to why the bank required, and Steffey gave, notes from time to time to cover his overdrafts. Without such explanation it is not apparent why, if Steffey was practically doing business for and as the agent of the president and cashier of the bank, he would give his personal note to the bank for money expended upon their behalf. When

called upon to give a note it would have been a very simple and a very natural thing for him to have said, "This overdraft represents expenditures upon your account, and therefore it is for you and not for me to take care of it" (p. 361).

The court has overlooked the fact that, though Kester and Kettenbach were cashier and president of the bank, respectively, the funds of the bank belonged to the stockholders and the depositors, and notwithstanding that they were using the funds of the bank in their own speculations, they were not only solicitous that their timber dealings would appear regular, but also that they were dealing honestly with the funds of the bank. Under such circumstances it would be neither improbable nor unreasonable for a person bearing the relations to them that Steffey did to give an accommodation note to cover his overdrafts. Moreover, as has been pointed out, several years after Steffey had given the notes Kester and Kettenbach paid the same, as they did with the Jackson O'Keefe notes that had been given to cover overdrafts.

The trial judge had also forgotten the irregular method pursued by the defendants in dealing with the funds of the bank in their own speculative enterprises. It was shown at the trial of Kester, Kettenbach and Dwyer, upon a charge of conspiracy to defraud the Government of the timber lands in suit, at which trial the district judge who decided these cases presided (case No. 1605, this court), that Kester, on April 2, 1906 (at the very time that Steffey was giving notes to cover his overdrafts), requested one Joseph Malloy to purchase two specific timber claims

for him. The arrangements were that Malloy was to pay \$1,800 apiece for the claims; he was to give a note to the Lewiston National Bank in the sum of \$3,600 and check upon that to purchase the claims. Malloy at that time did not have an account with the Lewiston National Bank, but gave a note for \$3,600; purchased the claims, drew two checks for \$1,800 each upon the bank the same day, thereby closing out the account, and turned the claims over to Kester and Kettenbach. Ten days later, April 13, 1906, Malloy requested Kester to return to him his note. This Kester declined to do but gave him the following receipt:

LEWISTON NATIONAL BANK,

Lewiston, Idaho, April 13, 1906.

Received from J. M. Malloy \$3,600.00, full payment for note of \$3,600.00.

GEORGE H. KESTER,

Cashier.

This note was kept in the files of the bank for more than a year, or until July 2, 1907, several days before Kester and Kettenbach retired from the bank, when the note and interest was charged to the timber account of Kester and Kettenbach. Kester and Kettenbach regularly paid interest upon this note, but though the note called for ten per cent they only paid interest at the rate of eight per cent. (*Kester, Kettenbach & Dwyer v. United States*, case No. 1605, pp. 863 to 869, this court; *Kettenbach & Kester v. United States*, case No. 2080, pp. 756 to 764, this court.)

We have on several occasions in the course of this brief referred to portions of testimony in other

cases between the same parties, tried in the same court in which the present cases were tried. The district judge in deciding the present cases has referred to matters of which he has taken judicial cognizance that are not in the record, and for that reason we feel justified in referring to the records of the other cases. The cases referred to have been tried in this court and form a part of the records thereof.

It is well settled that the courts will take judicial notice of the records and proceedings of its own court, but it is doubtful whether an appellate court will go into the record and proceedings of its court in other cases between the same parties in determining a case later brought before that court between the same parties and arising out of the same subject matter. There are cases, however, that seem to hold that this can be properly done.

In *Wilson v. Calculagraph Co.*, 153 Fed., 961, 962, the Circuit Court of Appeals for the First Circuit said:

We have no doubt that we are entitled to take judicial notice of our own records, especially where the facts constitute a part of the same litigation. (*Cushman Co. v. Goddard*, 95 Fed., 664, 665, and authorities there cited.) This reference is to our own opinion passed down on June 18, 1899, and it sufficiently states the rule without regard to later decisions in which the same rule has been stated.

The District Court held that Kester and Kettenbach were not aware of the illegal understanding or agreement that existed between Robnett and Carrie D. Maris in relation to her entry, and that Kester and

Kettenbach purchased the same in good faith and for value in the ordinary course of business. The court reached this conclusion by giving no weight whatever to the testimony of Robnett and accepting the version given by Kester and Kettenbach as true, and remarks upon the improbability of the story of Robnett who in endeavoring to sell the claim should relate to the prospective purchaser the invalidity of the entry.

Considering the relations that existed between Kester and Kettenbach, Dwyer and Robnett, there is nothing incredible or improbable about them discussing among themselves the methods which they pursued in procuring the various entries to be made, nor can the probability of the rehearsal among themselves of the ethics used in inducing entrymen to make entries for their use and benefit be gauged by the standards that are set for persons engaging in legitimate business. They were all engaged in an unlawful business and it is not unusual for persons so engaged to talk over their practices with others connected with them in the same line of endeavor, no matter how criminal in nature their practices might be. Robnett testified that the relations that existed between him and Kester and Kettenbach were confidential (p. 2328) and that he discussed with them and advised them of all his transactions in regard to timber matters. Robnett was the bookkeeper at the bank and knew that Kester and Kettenbach and Dwyer were using the bank's funds in their personal enterprises. It was he who manipulated the books of the bank and the reports to the comptroller to conceal these transactions. As a matter of

fact, it was necessary for their safety that they take him into their confidence and it was quite natural that they should talk among themselves of all their doings.

Chapman corroborates Robnett in this respect. His testimony on that point is as follows:

Q. Do you know whether or not Robnett advised Kester and Kettenbach of his timber transactions?

A. I don't know whether he advised them fully or not, but I know that they consulted each other; that is, at least he told them of his transactions.

Chapman further stated that the timber lands of all the parties, Kester, Kettenbach, and Robnett, were marked on the same map and kept at the bank (pp. 2772, 2773).

It will be noticed that in disposing of each of the entries composing the Robnett group, the Emory & Colby group, and the O'Keefe group, the court, after reviewing the testimony relative to each entry, would eliminate Robnett's evidence, and upon the statement made by the entryman, and upon the attending circumstances of the making of the entry, stated that the entry should be carefully scrutinized or that there is some doubt about the validity of the entry, or that the circumstances were merely suspicious, and then hold that there was not sufficient evidence to warrant cancellation of the entry. This suspicion, this doubt, in addition to the evidence of Robnett, should be held to sufficiently corroborate him and give to his testimony some weight.

Again, the court, in referring to the notes that were taken in the name of Robnett for the money furnished the entrymen forming his group, said:

It is quite clear, I think, that the notes were taken in Robnett's name merely as a matter of convenience and for the use and benefit of Kettenbach, who was furnishing the money. The transaction was in no wise concealed. The mortgages were at once placed on record by Kettenbach (p. 312).

We are unable to see how Kettenbach would be inconvenienced by taking the notes in Robnett's name as Robnett assigned the notes, without recourse, to him immediately after taking them. Kettenbach was at the bank equally as much as Robnett. The mortgages, however, were not assigned. It seems to have been the practice for Kester and Kettenbach not to exercise themselves in concealing matters wherein the record did not disclose their connection therewith. They were perfectly willing for the record to show that Robnett was taking mortgages on timber claims, while the notes that the mortgages were given to secure were held by them. It will be observed that the deeds in which Kester and Kettenbach appear as grantees, made in 1904 and 1905, were not of record until from one to two years after their dates.

The case of *Hafemann v. Gross*, 199 U. S., 342, cited by the District Court in the opinion as showing that, even accepting Robnett's statement of the arrangement he had with a number of the entrymen, said entries were not unlawfully made, is not in point in that the Supreme Court decided said case on the ground

that the contract did not give Hafemann any control over the disposition of the claim. In the present cases Robnett testified that he did control the disposition of the claim, and this is corroborated by the fact that every entryman he located conveyed when and to whom Robnett so directed. The fact that the entrymen in some circumstances testified that they would have sold their claims to some one else if such an opportunity had been offered is not controlling.

Under all the circumstances it would seem clear that Kester and Kettenbach acquired the Maris entry with knowledge and notice of its infirmity.

THE IDAHO TRUST COMPANY.

The twelve entries involved in case No. 2210, the titles to which are in the Idaho Trust Company, as grantee of W. F. Kettenbach and Kester, were conveyed to it by deed dated July 6, 1907 (p. 1719). This deed is a warranty deed in fee simple. The claims are the entries of Evans (p. 108, ib.), Bishop (p. 109, ib.), Newman (p. 110, ib.), Dent (p. 111, ib.), Smith (p. 113, ib.), Morrison (p. 82, ib.), Hyde (p. 84, ib.), Wilson (p. 160, ib.), Greenberg (p. 171, ib.), Bingham (p. 145, ib.), (Helkenberg, abandoned), and Clute (p. 108, ib.).

The number set out opposite each name refers to the page in this brief at which the evidence relative to each particular entry is mentioned. A reading of the pages referred to in connection with the summary of the evidence at the end of groups to which the entries belong will convince the court that said entries are in-

valid. As affecting the credibility of Kettenbach and the weight to be given to his testimony generally, and specially in connection with these entries, we again refer to his evidence to the effect that he would not have loaned the money to the entrymen forming the Robnett group had it not been for the bonus of \$200 that was given in each case, because of the poor security, namely the timber claims for which he advanced the money to purchase. Why then did he purchase three of said claims the same day on which he advanced the money, and the remainder of them shortly thereafter and pay therefor in addition to the amount of the notes and interest from \$25 to \$200 in each case? There was just as much danger of fire destroying the timber when he purchased as there was when he loaned the money.

The bill charges that the Idaho Trust Company acquired title to said claims with knowledge of their invalidity; and that it holds the titles thereto in trust for the use and benefit of Kester and Kettenbach.

The district court held that one of said claims, the Wilson entry was invalid and that the Idaho Trust Company purchased the same with notice thereof; in this connection it said:

I am satisfied from the testimony of the entrymen, reluctantly given, that, while there was *no express* agreement, there *was a perfect understanding* between him and the defendant Dwyer, *acting as the agent for Kester and Kettenbach*, that *all expenses* incident to the acquisition of title should be paid by Dwyer, and that the entryman was to receive \$150.00, in considera-

tion of which he was, upon acquiring title, to convey the same to Kester and Kettenbach. It is not necessary to decide whether or not Kester and Kettenbach had any actual knowledge of the arrangement with *Dwyer*; *Dwyer being their agent*, they are charged with notice. Nor is it thought that the Idaho Trust Company stands in the position of an innocent purchaser. Its chief officer, the defendant Frank W. Kettenbach, is an uncle of William F. Kettenbach, and was upon friendly, if not intimate, terms not only with W. F. Kettenbach, but with Kester, Dwyer and Robnett. Prior to the time the trust deed or mortgage was taken, the validity of this entry had been called into question by indictments filed in this court, and by criminal trials at a comparatively short distance from Lewiston, where the Trust Company was engaged in business, the trials resulting in the conviction of Robnett, Dwyer, Kester and William F. Kettenbach. The trials *attracted wide attention*, and it is *hardly conceivable that, under the circumstances*, the officers of the Trust Company were ignorant of the fact that the validity of this entry was being assailed by the Government. Taking into consideration all of the circumstances, including the relation of the parties, I think it must be held that the facts were sufficient to put the Trust Company upon inquiry, and that it took the title at its peril. It is therefore held that the patent should be cancelled (pp. 288, 289).

We shall show that it took title to all the other entries above mentioned also with notice and knowledge that they were unlawfully made. •

On July 23, 1907, the defendants William F. Kettenbach and George H. Kester and the Idaho Trust Company executed what is called a trust agreement, reciting the deed of July 6, 1907, and defining the terms and conditions upon which the trust company should hold the title to the real estate conveyed to it by said deed. The trust agreement is executed on behalf of the Idaho Trust Company by Frank W. Kettenbach, its president.

Under the terms of said trust agreement, the Idaho Trust Company has practically no powers whatever. It is to hold the property in trust for Wm. F. Kettenbach and Geo. H. Kester, their heirs, executors, administrators and assigns. There is no power to sell any portion of said real estate except at such prices and upon such terms as Kester and Kettenbach, in writing, shall direct.

It is merely to hold the record title of said property until Kester and Kettenbach shall see fit to pay whatever notes they at that time had outstanding against them in the hands of the Idaho Trust Company or the Lewiston National Bank. Kester and Kettenbach could sell any or all of said tracts of land to whomsoever they saw fit at such prices and under such conditions as they thought best, the Idaho Trust Company having no voice in that matter other than to demand that the proceeds of such sales be delivered to it. There is no provision for a sale in default of payment of any notes of Kester and Kettenbach it might hold, no matter how long past due said notes might be. In other words, the effect of the trust agreements, and

hence of the deeds, is that said company merely holds the record title to said lands (p. 192).

The record further shows that at the date of the deed of Kester and Kettenbach to the Idaho Trust Company and at the date of the trust agreement, Wm. F. Kettenbach was not indebted either to the Idaho Trust Company or to the Lewiston National Bank in any sum whatever, nor was any advance made to him by either institution until after one of the present causes was filed involving the property conveyed, and in which Frank W. Kettenbach, with whom the conveyances were negotiated, was the party and had been served with a subpoena.

Under the terms of the trust agreement the undivided half interest of Kettenbach in said property was in no way to be liable for any indebtedness which had been, or that might thereafter be, incurred by Kester, nor was Kester's interest in said lands to be liable for any indebtedness that might be incurred by Kettenbach.

Said agreement is not of record.

At the time of the execution of said deed of July 6, 1907, W. F. Kettenbach and George H. Kester were then, and for 10 years prior thereto had been, president and cashier respectively of the Lewiston National Bank; that at the date of execution of said deed Frank W. Kettenbach, the uncle of William F. Kettenbach, was, and for five years prior thereto had been, the president of the Idaho Trust Company. The day following the execution of said deed, and before the same had been recorded, W. F.

Kettenbach and George H. Kester resigned their positions from the Lewiston National Bank, and Frank W. Kettenbach on the same date was made the president of the Lewiston National Bank, and retained the presidency of the Idaho Trust Company. E. C. Smith, secretary of the Idaho Trust Company, succeeded Kester as cashier of the Lewiston National Bank. On the day W. F. Kettenbach retired from the bank he disposed of his stock to Frank W. Kettenbach, and on the day of the execution of said deed and of said trust agreement W. F. Kettenbach was not indebted to either the Lewiston National Bank or to the Idaho Trust Company, and said instruments were not given to secure any indebtedness of W. F. Kettenbach then existing (p. 3660), and W. F. Kettenbach does not now owe anything under the trust agreement (pp. 1917, 1918).

Frank W. Kettenbach had the management of the affairs of the Idaho Trust Company, and W. F. Kettenbach and Kester managed the Lewiston National Bank while they were president and cashier respectively (p. 1738), and after Frank W. Kettenbach became president of the Lewiston National Bank he had the sole management of that institution (p. 1739).

During the years 1902 to 1907 inclusive W. F. Kettenbach and his sister and George H. Kester owned about eighty per cent of the stock of the Lewiston National Bank (pp. 1958-1966). At the date of the execution of said deed and trust agreement Frank W. Kettenbach and his relatives and E. C.

Smith owned and controlled more than fifty per cent of the stock of the Idaho Trust Company (pp. 1896-1898).

In July, 1905, Jackson O'Keefe, George H. Kester, William F. Kettenbach and William Dwyer were indicted (No. 605) in this court for conspiracy to defraud the United States of its valuable timber lands, and the claims specifically mentioned therein as being unlawfully entered were the entries of Charles W. Taylor, Edgar H. Dammarell, Edgar J. Taylor, and Joseph H. Prentice (pp. 2954, 3992).

On July 13, 1905, W. F. Kettenbach, George H. Kester, and William Dwyer were again indicted (No. 607), charged with conspiracy to defraud the United States of its valuable timber lands, and the entries specifically mentioned therein were those of Rowland A. Lambdin, Fred W. Schaeffer, and Ivan R. Cornell (pp. 2954, 4000).

On November 6, 1905, W. F. Kettenbach, Kester and Dwyer were again indicted (No. 615) for conspiracy to defraud the United States of a large amount of its valuable timberlands, the entries specifically mentioned in that indictment being those of Edward M. Lewis, Hiram F. Lewis, Charles Carey, and Guy L. Wilson (pp. 2954, 3982).

On November 6, 1905, William Dwyer was convicted (No. 616) for subornation of perjury in connection with the entries of Hiram F. Lewis, Charles Carey, and Guy L. Wilson (p. 2959).

On November 6, 1905, Fred Emory, C. W. Colby, George H. Kester and William F. Kettenbach were

indicted (No. 618) for conspiracy to defraud the United States of its valuable timberlands, the entries specifically mentioned in that indictment being those of James C. Evans and Charles Dent.

On November 6, 1905, William B. Benton, Clarence W. Robnett, and W. F. Kettenbach were indicted (No. 617) for conspiracy to defraud the United States of a large amount of its valuable timberlands, the specific entries referred to therein being those of John H. Long, Francis M. Long and Benjamin F. Long.

In case No. 615 Joseph Alexander, vice president of the Lewiston National Bank, and Frank W. Kettenbach were sureties on the bond of W. F. Kettenbach, dated July 9, 1906; and Joseph Alexander was surety on the bond of Kester. (See certified copy of bond filed with clerk of this court.)

In case No. 617 Frank W. Kettenbach and Joseph Alexander were sureties on the bond of W. F. Kettenbach, and Frank W. Kettenbach and E. C. Smith were sureties on the bond of William B. Benton. (See certified copy of bond filed with clerk of this court.)

In case No. 618 Frank W. Kettenbach and Joseph Alexander were sureties on the bond of W. F. Kettenbach, and Joseph Alexander was surety on the bond of Kester, all of said bonds being given in January, 1906. (See certified copy of bond filed with clerk of this court.)

On June 17, 1907, W. F. Kettenbach, Kester and Dwyer, having been convicted in case No. 615, and Dwyer in No. 616, were sentenced to imprisonment and a fine (pp. 2955 to 2962).

From the petition filed in said district court in May, 1910, by Frank W. Kettenbach, and supported by his affidavit, praying a change of place of trial from the division of the district where these lands are situated, and where Frank W. Kettenbach resides, on the ground of hostility against him and W. F. Kettenbach and Kester, by reason of certain newspaper publications commenting on their timber transactions in 1904 down to 1910, it would appear that everybody in the northern section of the State of Idaho were given notice and placed on inquiry as to the Kester-Kettenbach timber deals (p. 4032). E. C. Smith stated that he knew of the conviction of Kester, W. F. Kettenbach and Dwyer in 1907, and that it was a matter of general knowledge in Lewiston (p. 1957). Frank W. Kettenbach testified that at the time the Government was investigating the timber transactions of Kester, W. F. Kettenbach and Robnett, and the grand jury returning indictments against them, and the prosecutions were in progress he had a great deal of sympathy for the defendants, and during the period he and Robnett often met on their way to the office in the morning and in returning to their homes in the evening, and discussed said cases, and that these conversations between Frank W. Kettenbach and Robnett occurred before Kettenbach bought an interest in the Lewiston National Bank in July, 1907 (pp. 3571 to 3573); that he, Frank W. Kettenbach, was a witness for the defense at the land fraud trials of Kester, Kettenbach and Dwyer, at Moscow, in 1907 (p. 3578), and knew of the convictions of Kester, Kettenbach

and Robnett, and that they resigned their positions in the bank on account of those convictions (pp. 3578 and 3590); and that Frank W. Kettenbach lived next door to W. F. Kettenbach during all this period (p. 3659). Frank W. Kettenbach also testified that at the time the trust agreement was executed W. F. Kettenbach did not owe the bank anything (p. 3592). At page 3602 of the record he testifies that he knew there was a *lis pendens* on some of the claims mentioned in the trust agreement, but that there was sufficient amount of other land included in the agreement, and he was satisfied with the security.

Frank W. Kettenbach and E. C. Smith were incorporators of the Idaho Trust Company, and E. C. Smith subscribed 350 shares of the stock of that company; W. F. Kettenbach, 100 shares; Elizabeth White, 50 shares; Grace K. Pfafflin, 50 shares; Amy G. Kettenbach, wife of Frank W. Kettenbach, 10 shares; Otto Kettenbach, nephew of F. W. Kettenbach, 15 shares; and James E. Babb, 5 shares (pp. 1890-1893). In the year 1908, 910 shares of the total 1,000 shares of the Lewiston National Bank stock were purchased and owned by the Idaho Trust Company (p. 1966).

The entries of William McMillan and Hattie Rowland are also involved in case No. 2210, and the evidence concerning said entries is recited at pages 172, 174, 178, *ib.*, and we think is sufficient to justify the cancellation of the patents issued for them.

McMillan and Rowland conveyed their claims to Kittie E. Dwyer April 9, 1906, and Kittie E. Dwyer conveyed the titles to the same, by warranty deed, to

the Idaho Trust Company December 31, 1908 (pp. 1501, 1502, 1508, 1509). On December 31, 1908, Kittie E. Dwyer and William Dwyer executed with the Idaho Trust Company a trust agreement reciting the conveyance in fee simple to said company and the terms of said agreement, being practically the same as those in the agreement between Kester and Kettenbach and the said Trust Company of July 23, 1907 (p. 1935). Frank W. Kettenbach negotiated with the Dwyers relative to said deed and trust agreement (p. 1920). On December 30, 1907, Dwyer and wife gave a mortgage to the Lewiston National Bank on said claims, but at that time a notice of lis pendens was of record and said claims were involved in what is now case 2209 (pp. 1502, 1508, 1509), and at the date of the conveyance by the Dwyers to the Idaho Trust Company of said claims said lis pendens and notice thereof was still subsisting of record. Dwyer and Frank W. Kettenbach were parties to the suit and Frank W. Kettenbach had been served with subpoena.

Under the circumstances herein detailed, it is clear that Frank W. Kettenbach had knowledge of the conditions under which said entries were made and perfected or at least had and therefore under all the circumstances the Idaho Trust Company can not be held to be an innocent purchaser.

It has been well said that an absolute deed with a separate defeasance will always appear with the face of fraud. In view of the conditions that existed at the dates of the execution of said instruments, aside and apart from the badge of fraud that attaches to

them by reason of the said conveyances, it is clear that said conveyances were made in order to get the record title out of Kester, Kettenbach, and Dwyer and of record in the name of some other person or corporation, and thereby make it appear that said parties had parted with all of their interest in said lands. This was done in the hope that they would thereby escape the anticipated attack upon them on the ground of fraud and the grantees would be able, in the event of such proceedings, to set up the defense of bona fide purchaser.

THE LEWISTON NATIONAL BANK.

The titles to the entries of Van V. Robertson, Drury M. Gammon, and Robert O. Waldman are in the Lewiston National Bank. The evidence relating to the Robertson entry is set out at page 51, *ib.*; as to the Gammon claim at page 92, *ib.*; and to the Waldman claim at page 60, *ib.*; and shows all of said entries to be invalid. The district court held that the Waldman entry was unlawfully made and that the Lewiston National Bank took title to the same under such conditions that it can not claim the protection of an innocent purchaser and ordered the patent be canceled (pp. 289, 290).

As to the Gammon entry, the court was inclined to think that it was made in fraud of the statute, but that the Lewiston National Bank acquired title to the same as an innocent purchaser. The court reached this conclusion by giving credence to the version of the transaction given by Kester in preference to that of Robnett

(p. 305), notwithstanding Robnett was strongly corroborated. A reading of the evidence at the pages here cited will convince the court that the bank did not take title to the Gammon and Robertson entries as an innocent purchaser.

THE CLEARWATER TIMBER COMPANY.

The Clearwater Timber Company took title to the entries of William B. Benton, Joel H. Benton, Pearl Washburn, William Haevernick, Alma Haevernick, and Geary Van Artsdalen; and the bill of complaint in case No. 2210 alleges that said company took and now holds the title to said claims knowing the entries to be invalid and voidable at the suit of the United States. As hereinbefore stated we abandon the Van Artsdalen entry.

The evidence showing that said other entries are invalid is set out in this brief at the following pages: William B. Benton's entry (p. 46, *ib.*); the Joel H. Benton entry (p. 47, *ib.*); the Pearl Washburn entry (p. 50, *ib.*); and the Haevernick entries (p. 128, *ib.*); and in the summary of the evidence concerning the Robnett group (p. 96, *ib.*).

The district court was unwilling to hold the William B. Benton entry for cancellation because it believed the version of the transaction recited by Benton and Kettenbach in preference to that given by Robnett. The court said:

He (Kettenbach) further testifies that Robnett had some timber claims that he was trying to dispose of, but being unable so to do appealed to Kettenbach to assist him, and, for

the purpose of enabling him to sell the lands for Robnett, the transfer was made to Mrs. White, who later transferred to the Clear-water Timber Company. Robnett testifies that he told Kettenbach all about his illegal arrangements with Benton. This is denied by Kettenbach. No reason is given by Robnett why, when he was endeavoring to sell the land, *he should have disclosed facts invalidating the title, and it would seem quite irrational for a vendor voluntarily and needlessly to make known the existence of facts which, if true would disclose the invalidity of the title which he is trying to sell.* To hold the entry invalid, Benton's testimony must be rejected, and Robnett's believed. *Benton is Kettenbach's cousin, and it may be assumed that if he had an illegal contract he would be in a general way interested in concealing the facts, but whatever may be the indirect interest of Benton and Kettenbach in the result of the litigation, I think it must be held that in the absence of circumstances tending to make Robnett's story more probable than theirs, the evidence is insufficient to warrant a cancellation of the patent (pp. 292, 293).*

As hereinbefore stated there was nothing irrational in Robnett telling Kettenbach the condition upon which he had procured Benton to make the entry, as they were all engaged in the same business—the procuring of timber claims unlawfully; and all were acting in concert in that business.

As to the Joel H. Benton entry, the court said:

Upon the whole, I would be inclined to hold the entry for cancellation were it not for the rights of the Clearwater Timber Company as an innocent purchaser. While the point is not entirely free from doubt, it is thought that this company did not have such knowledge of the circumstances under which the entry was made, or such notice of the claims of the Government, as to put it upon inquiry. It is true the purchase was made after much publicity was given to the criminal prosecutions against Robnett, Dwyer, Kester, and W. F. Kettenbach, and it is also true that one of the agents of that company testified at one of the criminal trials, but it does not appear that he or any other officer of the company was aware that this particular claim was involved in the criminal prosecutions, or that it was called into question by the Government. The witness Robnett testifies that the transfer was made by him to Elizabeth White upon the suggestion of the defendant William F. Kettenbach that the timber company would not buy the claim from him, but would buy the same from Elizabeth White. This is denied by Kettenbach, but if we assume it to be true, such a statement on the part of Kettenbach is not competent as proof against the timber company, and there is no evidence that any *resident agent* in Idaho of the timber company had *any knowledge at the time* the agreement to purchase was made that the title came through Robnett, or that he had ever had anything to do with it.

* * * In view of all the circumstances, it is thought that the relief prayed must be denied (pp. 316, 317, 318).

The agent of the Clearwater Timber Company, who testified at trials above mentioned, was the *resident agent* and the ONLY agent that said company had in Idaho. He testified that it was a part of his duties to purchase timberland in said State. At the trial mentioned Joel H. Benton also testified and admitted on the witness stand that the very same entry now under discussion was entered upon a prior agreement with Robnett.

From 1902 down to the present time Nathaniel Brown has been the business agent of the Clearwater Timber Company in the State of Idaho and has been engaged in purchasing timber for said company during that period.

As mentioned in the recital of the evidence referred to, and on page 2313 of the record, the Benton claims were conveyed to Robnett, by him to Elizabeth White, and by Elizabeth White to the Clearwater Company. The conveyances to Elizabeth White were executed the date that Kester and Kettenbach and Robnett resigned from the bank. Brown negotiated for the Benton claims at the bank with William F. Kettenbach (p. 1650), and because of the investigation of the timber dealings of Kester, Kettenbach, and Robnett they could not negotiate with the Clearwater Timber Company for the sale of the claims unless they were deeded to Mrs. White. The deeds to the Benton claims were executed to the Clearwater Tim-

ber Company September, 1907, after the conviction and sentence of Kester, Kettenbach, and Robnett.

The negotiations for the sale of the Pearl Washburn claim were conducted by John E. Chapman, teller of the Lewiston National Bank, and W. F. Kettenbach with Nathaniel Brown. This deed was executed the day before Kester and Kettenbach retired from the bank.

Brown purchased the claim of the Haevernicks for the Clearwater Timber Company from F. W. Kettenbach. At the time of the acquisition of these claims by the Clearwater Company, Brown had been well acquainted with Dwyer, Kester, and Kettenbach for a number of years, and remembers the conviction of them at Moscow in 1907 for conspiracy to defraud the United States of its timberlands, and also knew of the conviction of Dwyer in the fall of 1906 for subornation of perjury growing out of his timberland transactions (pp. 1646 to 1649).

At the trials of Kester, Kettenbach, and Dwyer, Brown was a witness on behalf of the Government (p. 1676).

Q. And that trial was of almost State-wide interest?

A. Yes; people heard generally of it.

Q. You never knew of trials in this State that were so much talked of as those trials, did you?

A. Well, I didn't hear a great deal of the talk, Mr. Gordon. I was in the woods most of the time.

Q. But even people in the woods knew it was going on, didn't they?

A. Yes, sir.

The following circumstances tend to corroborate Robnett's statement that Elizabeth White was merely the conduit through whom the title to said claims passes to the Clearwater Timber Company to satisfy the agent of said company, who declined to take the claims either from Kester and Kettenbach or Robnett because of their convictions and sentences, but would take the title to said claims from Mrs. White.

The claims of William B. and Joel H. Benton and two other claims were conveyed to Robnett and by him conveyed to Elizabeth White July 8, 1907, the day Kester and Kettenbach retired from the bank and the day after they had conveyed their timber claims to the Idaho Trust Company in the circumstances herein mentioned. Elizabeth White conveyed said claims to the Clearwater Timber Company September 4, 1907.

William F. Kettenbach testified that he purchased the claims for Mrs. White and paid for them all that they were worth (p. 3435).

The testimony of Mrs. White indicates that she knows nothing about the claims other than that she was the "third party" in the transaction with the Clearwater Timber Company (pp. 767, 768).

When two of the claims were conveyed in September, 1907, to the Lewiston National Bank, Frank W. Kettenbach, who at that time was president of the bank, paid the purchase price of said claims to Robnett and not to Mrs. White (pp. 3569 to 3571, 4193).

The importance of Mr. Brown, the agent of the Clearwater Timber Company in Idaho, can not be minimized.

It seems immaterial whether or not the president, the secretary, and the assistant secretary of the Clearwater Timber Company resided at St. Paul and Tacoma, or whether or not Brown ever read the abstracts of title, or had to depend upon a Mr. Davies, in the State of Washington, to honor his drafts when he purchased timber claims for the Clearwater Timber Company. He was the only agent of the Clearwater Timber Company in Idaho and it was he who negotiated for and purchased the timber claims in suit, and notice to him, or his knowledge, was constructive knowledge and notice to the company he represented, and the evidence points strongly to the fact that he had knowledge and notice of the illegality of the claims in suit purchased by him.

The evidence set out at page 57 of this brief concerning the entry of Soren Hansen will show beyond question that the entry was made pursuant to a prior agreement or understanding between the entryman and Robnett, as is denounced by the statute; and the circumstances surrounding the transfers of title to the claim will be further proof of the relations that existed between Robnett, Kettenbach, and the agent of the Clearwater Timber Company, and indicating a disposition of the latter to assist Kettenbach to conceal the record title to land Kettenbach had unlawfully obtained.

As will be seen at the page referred to, the Hansen claim has had a varied career. Hansen, at the request of Robnett, first executed a deed for the claim in blank. He then made another deed to Mrs. Thatcher of the claim. He also executed a deed for the claim to W. F. Kettenbach and one to the Clearwater Timber Company, the latter at the request of Robnett and W. F. Kettenbach, and being the only deed to the claim of record. The Clearwater Company has never purchased the claim or given any consideration for the deed or made claim to the property, but has executed a deed for the same to W. F. Kettenbach, which, at the time of the taking of the testimony in these causes, was brought into court by the attorney for the Clearwater Timber Company and it was read into the record. The Clearwater Timber Company did not pay taxes on the Hansen claim (p. 1524). Brown, the agent of the Clearwater Company, in relating the transactions concerning this claim, said that he agreed to purchase the Hansen claim from W. F. Kettenbach; that the deal was not consummated, because there was a *lis pendens* of record against it; that he submitted the matter to the company's attorney and declined to accept the deed from Kettenbach, and neither he nor his company recorded the same nor claimed any interest in it. The deed was recorded by W. F. Kettenbach. Kettenbach requested him to have the company reconvey the title to Kettenbach (p. 1641).

The quitclaim deed from the Clearwater Timber Company to W. F. Kettenbach produced in court as

herein stated is dated July 12, 1910, and recites that the deed from Kittenbach to the company was placed of record by a mistake, and for that reason the quit-claim deed is executed. The deed was forwarded to the attorney for the company, who is also its attorney in these cases, with a letter stating: "We are inclosing you a deed from the Clearwater Timber Company to W. F. Kettenbach, duly executed. E. N. Brown sends us this deed for execution, with an explanation of why it should be so deeded, and informs us you are aware of the circumstances leading up to our having the title thereto and why it should be deeded back to Mr. Kettenbach" (p. 1666).

Brown further testifies that he wrote the president of the company a letter saying that the deed had been recorded by mistake and that the land did not belong to the company (p. 1669). Brown says that he had notice that something had been filed against the Van Artsdalen claim and the other claims he had purchased (p. 1671), and that Kettenbach asked him to see their attorney about taking deeds under lis pendens "and some other deeds with notations of filings against them" (p. 1672).

W. F. Kettenbach, testifying relative to the Hansen claim, says that he paid the mortgage and gave Robnett \$60 to pay to Hansen, and that Hansen was paid the \$60 in his presence; that he told Brown of the lis pendens and Brown declined to take the claim; that he still owns the claim, and that he recorded the deed to the Clearwater Timber Company to protect himself (pp. 1692, 1693). Under all the

circumstances the patent for this deed should be canceled.

Under the circumstances the Clearwater Timber Company is not an innocent purchaser, but took the claims with notice.

The claim of John E. Nelson was conveyed to E. W. Thatcher May 18, 1908, and at that date a notice of his pendens was of record involving said claim (p. 1505; pp. 54, 96, *ib.*).

**KINSFOLK OF KESTER AND KETTENBACH WHO HOLD TITLES
IN TRUST FOR THEM.**

The claims of Wm. J. and Mamie P. White were conveyed to Elizabeth White January 15, 1909, and while notice of his pendens was of record (pp. 1517, 1518; pp. 168, 170, *ib.*).

The title to the claims entered by Edna P. Kester, Elizabeth White, Elizabeth Kettenbach, and Martha E. Hallett is still in them of record. The details of the making of each of these entries, together with those of William J. and Mamie P. White, are set out and besides the facts that they were taken to the timber by Kester and referred to as Kester's party; that the money for several of them was furnished by Kester or Kettenbach; that the taxes on them had been paid by Kester and Kettenbach; that they were included in the option signed by Kester in 1906, with the exception of the Hallett entry; and are included in an option given by W. F. Kettenbach and Kester November 23, 1909 (pp. 2135, 3948; pp. 164, 167, 168, 171, 178, *ib.*).

In fact, W. F. Kettenbach and Kester have exercised ownership over these claims ever since they were first entered.

The evidence warrants a cancellation of said entries.

But as said claims are involved in cause No. 2210 (p. 24 of brief).

POTLATCH LUMBER COMPANY.

The claims entered by Ivan R. Cornell, Rowland A. Lambdin, and Fred W. Shaeffer were conveyed to Kester & Kettenbach, and by the latter to the Potlatch Lumber Company in 1903 and 1906, and there is little in the record to show that the Potlatch Lumber Company is not an innocent purchaser.

LAW OF CONSPIRACY.

In *United States v. Cassidy* (67 Fed. Rep., 689) the court said:

“and while it is necessary, in order to establish a conspiracy, to prove a combination by two or more persons, by concerted action, to accomplish the criminal or unlawful purpose, it is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons in any man-

ner, or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of the said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, and was to be executed at a remote distance from the other conspirators. A combination formed by two or more persons to effect an unlawful end is a conspiracy, said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto from that time as if he had originally conspired. * * * Furthermore, where several persons are proved to have conspired together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy. It is also true that any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, when the combination is proved, are as much respon-

sible for such declarations and the acts to which they relate as if made and committed by themselves. This rule, you will understand, applies to the declaration of the co-conspirator, although he may not be under prosecution, his declaration being equally admissible with those of one under indictment and prosecution.”

Followed in *Thomas v. United States* (156 Fed., 910).

EVIDENCE.

An act innocent in itself may be a step in a criminal plot.

Aben v. Wisconsin (195 U. S., 206).

Declaration of co-conspirators, evidence against all.

Connecticut Mutual Life v. Hellman (188 U. S., 218).

United States v. Cassidy (67 Fed. Rep., 698).

United States v. Francis (144 Fed. Rep., 523).

United States v. Richards (149 Fed. Rep., 444).

United States v. Alkon (163 Fed. Rep., 810).

Acts of others admissible if made in carrying conspiracy into effect.

Clune v. United States (159 U. S., 590).

Thomas v. United States (156 Fed. Rep., 910).

Fraud is not often proved by direct testimony. A preconcerted plan to do an unlawful act must, from the nature of the case, be usually established by in-

ferences drawn from the relations of the parties, from the acts done, and from the results achieved.

Thomas v. United States (156 Fed. Rep., 910).

Act of one co-conspirator, act of all.

Ex parte Black (147 Fed., 838 and 840).

Logan v. United States (144 U. S., 263).

Brown v. United States (150 U. S., 93).

Not necessary to show formal agreement.

Reilly v. United States (106 Fed., 896).

Davis v. United States (107 Fed., 755).

United States v. Cassidy (67 Fed., 698).

Thomas v. United States (156 Fed., 912).

It is not necessary that the conspiracy originated with the defendants; or that they met during the process of its concoction; for every person entering into a conspiracy or a common design already formed, is deemed in law a party to all the acts done by any of the other parties before or afterwards in furtherance of the common design.

Greenleaf on Evidence, vol. 3, sections 92, 93, and 95.

Jayne v. Loder (149 Fed., 21 and 30).

BONA FIDE PURCHASER.

The essential elements which constitute a bona fide purchase are three—a valuable consideration, the absence of notice, and the presence of good faith.

Pomeroy's Equity Jurisprudence, section 745.

United States v. California & Oregon Land Co. (148 U. S., 31).

United States v. Winona & St. Paul Railroad Co. (165 U. S., 463).

Not only must there be a valuable consideration in fact, but it must be paid before notice of the prior claim. Notice after the agreement for the purchase is made, but before any payment, will destroy the character of the bona fide purchaser.

Pomeroy's Equity Jurisprudence, section 750.

Boone v. Chile (10 Peters, 211).

Balfour v. Hopkins (93 Fed., 564 and 570, Ninth Circuit).

The rule is universal and elementary, that if a purchaser in any form *receives notice* of prior adverse rights in and to the same subject matter before he has completely acquired or perfected his own interests under the purchase, his position as a bona fide purchaser is thereby destroyed, even though he may have paid a valuable consideration. On the other hand, notice given after his interests have been acquired or perfected produce no injurious affect.

Notice sufficient to prevent the purchase from being bona fide may inhere in the very form and kind of the conveyance itself.

Pomeroy's Equity Jurisprudence, section 753.

If a person is charged with constructive notice of fraud, where the circumstances are such as to enable the court to say, not only that he might have acquired but also that he ought to have acquired the notice with which it is sought to affect him, that he would

have acquired it but for his gross negligence in the conduct of the business in question. Inquiry is made a duty where there is such a feasible state of things as is inconsistent with perfect right in him who proposes to sell.

Wilson v. Wall (73 U. S., 83, 91).

Townsend v. Little (109 U. S., 504, 511).

Crawford v. Neal (144 U. S., 585, 595).

Conceding that the indispensable elements of such a defense are absence of notice of the fraud or defect, good faith, payment of value, and the legal estate, it is not material at what time or in what order the purchaser acquires them. It is only necessary that they all concur in him at the same time. It is *indispensable* to this defense that the consideration should be paid before notice of the defect. But it is not essential that it should be paid before or at the time the title is conveyed. It is sufficient if the payment is *completed* at any time *before notice of the defect is received*. It is not more essential that the legal title should be secured before or at the time when the consideration is paid. It is enough if it is acquired before notice of the alleged fraud or perjury is fastened upon the purchaser.

United States v. Detroit Timber & Lumber Co. (131 Fed., 668, 676; 200 U. S., 321).

PURCHASE FOR VALUE—ANTECEDENT DEBT.

A purchaser of real property or the assignment of a mortgage thereon for an antecedent debt does not make the vendee or assignee a purchaser for a

valuable consideration so as to entitle him to protection against a prior conveyance of, or right in or to, such property.

The reason for the latter rule is that the purchaser has not parted with anything of value. He loses nothing by the transaction. Therefore there is no reason why equity should interfere to protect him against a prior right although he may have taken such conveyance or security without notice thereof.

Gest v. Packwood (34 Fed., 368).

The Elmbank (73 Fed., 610; opinion by Judge Morrow).

Hill v. Hight (79 Fed., 826).

Missouri Broom Manufacturing Co. v. Gaymon (115 Fed., 112).

This is a decision by the Circuit Court of Appeals for the Eighth Circuit, and refers to a situation of which it says:

We have been forced to conclude (that certain matter) was in fact inserted in the deed of trust for no other purpose than to furnish a pretext for such a claim as has been made, namely, that such extension of time or payment was a new and additional consideration for the conveyance, such as protects the creditor and arms him with the rights of an innocent purchaser for value. Instead of having the effect intended it really creates grave suspicion that the creditor either knew or suspected that the Broom Company could not transfer a good title to some of the property in its possession which it offered to pledge as security for its debt.

Held that parties were not innocent purchasers.

In *People's Savings Bank v. Bates* (120 U. S., 556; 30 L. E., 754) Mr. Justice Harlan quotes from the opinion of Mr. Justice Storey in *Morse v. Godfrey*, as follows:

This leads me to remark that the bank does not stand within the predicament of being a bona fide purchaser for a valuable consideration without notice, in the sense of the rule upon the subject. The bank did not pay any consideration therefor, nor did it surrender any security or release any debt due either from Reed or Godfrey to it. The transfer from Godfrey was a simple collateral security taken as additional security for the old indebtedness and liability of the parties to the notes described in the instrument of transfer. It is true that, as between Godfrey and Reed and the bank, the latter was a debtor for value and the transfer was valid; but the protection is not given by the rules of law to the parties in such a predicament merely. He must not only have had no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities held for the debts and liabilities. But where the bank has merely possessed itself of the property transferred as auxiliary security for the old debts and liabilities, it has paid or given no new consideration upon the faith of it. It is therefore in truth no purchase for value in the sense of the law.

After citing other authorities, Justice Harlan, continuing, said:

Without further discussion of the authorities cited by counsel, all of which have been carefully examined, we are of the opinion that the claim of the bank to be a subsequent mortgage in good faith can not be sustained because the mortgage of February 11, 1881, although first filed, was not given in consideration of its having surrendered or agreed to surrender or to postpone the exercise of any substantial right it had against the mortgagor, but merely as collateral security for past indebtedness. Under such circumstances the mortgage which was prior in time confers a superior right.

In *Loring v. Palmer* (118 U. S., 321; 30 L. E., 211) the Supreme Court held that where the interest of the cestui que trust was not created by the deed to the trustee but by the original contract of purchase in connection with certain contemporaneous correspondence the legal title did not vest in the cestui que trust by virtue of the statute of Michigan abolishing passive trusts, but he merely took an equitable title, and his remedy, if any, is a court of equity and not by ejectment.

When a grantee subsequently acknowledged in writing that he had received the property as security for debt, proved him a trustee.

Safford v. Rantons (12 Pickering, 233).

See also decision Judge Wolverton, Supreme Court of Oregon, July, 1897, in *Perkins v. McCullough* (49 Pac. Rep., 861).

Where one takes a conveyance to pay debts he holds as trustee, and the grantor has an interest in the land conveyed.

Janes v. Throckmorton (57 Cal., 368).

(Instructive decision by Judge Ross.)

See:

Stewart v. Platt (101 U. S., 731).

Sayre et al. v. Weil (15 L. R. A., 544).

Lockett v. Robinson (20 L. R. S., 67).

EQUITIES AGAINST MORTGAGEE.

As a general rule an equitable mortgagee takes subject to all the equities affecting the mortgagor.

11 Encyc. Law, 142.

Parker v. Clark (30 Beav., 54).

Maningford v. Coventy Union Bank (8 W. R., 729.)

Shropshire Union R. v. Reg. L. R. (7 H. L., 496) ;

The purchaser has no right to shut his eyes and his ears to the inlet of information and then say he is a bona fide purchaser.

Simmons Creek Coal Co. v. Doran (142 U. S., 413, 437).

Cook on Corporations (Sec. 726, sixth ed.).

McCaskell v. United States (Advance Sheets United States Supreme Court Reports Apr. 1, 1910, p. 386).

California Consolidated Mining Co. v. Manly (81 Pac., 50).

Hoffman Steam Coal Co. v. Cumberland Coal Co. (16 Md., 456).

Bennett v. Minot (28 Oreg., 346).

CAN A GRANTEE UNDER A QUITCLAIM DEED BE A BONA
FIDE PURCHASER ?

A quitclaim deed conveys interest of the grantor only; not the land. The purchaser under such a deed is not a bona fide purchaser without notice.

Richards v. Snyder and Crews (11 Oregon, 501).

Baker v. Woodward (12 Oregon, 3).

American Mortgage Co. v. Hutchinson (19 Oregon, 334).

A quitclaim deed in the chain of title to property is sufficient to put a purchaser on inquiry.

Baker v. Woodward (12 Oregon, 3).

Contra: *Boynton v. Haggert* (120 Fed., 819, 823, 825).

See also *United States v. California & Oregon Land Co.* (148 U. S., 31).

Stanley v. Schwalby (162 U. S., 277).

One who acquires his title by a quitclaim deed cannot be regarded as a bona fide purchaser without notice.

May v. Leclaire (78 U. S., 217, 232).

Oliver v. Piatt (3 Howard, 333, 410).

Van Rensselaer v. Kearney (11 Howard, 297).

Villa v. Rodriguez (12 Wallace, 323, 339).

Deckerson v. Colgrove (100 U. S., 578).

Baker v. Humphrey (101 U. S., 494).

Hanrick v. Patrick (119 U. S., 156).

Hastings v. Nissen (31 Fed., 597).

Gest v. Packwood (34 Fed., 368, 372).

The doctrine of the cases last above cited was qualified in the case of *The United States v. California & Oregon Land Company* (148 U. S., 31), but not sufficiently to disturb the effect of the former in cases in which the relations between the grantor and the grantee were such as existed between O'Keefe, Kester, and Kettenbach.

See also *Moelle v. Sherwood* (148 U. S., 21).

United States v. California & Oregon Land Co. (49 Fed., 496).

NOTICE.

Notice to an agent in the business or employment which he is carrying on for his principal is a constructive notice to the principal himself, so far as the latter's rights and liabilities are involved in or are affected by the transaction.

Section 666, 673, Pomeroy's Equity Jurisprudence, vol. 2, third edition, and notes to said section.

Wood v. Rayburn (18 Oregon, p. 1).

Smith v. Ayer (101 U. S., 120).

There is an important exception to the foregoing rules, as follows:

It is settled by a series of decisions possessing the highest authority that when an agent or attorney has in the course of his employment been guilty of an actual fraud, contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client as well as, perhaps, the other party, and the very perpetration of such fraud involved the necessity of his concealing

the facts from his own client, then, under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed. In such a case a presumption arises that no communication was made, and consequently the principal is not affected with constructive notice.

Section 675, Pomeroy's Equity Jurisprudence.

Surety Co. v. Pauly (170 U. S., 133).

Henry v. Allen (151 New York, 1).

36 L. R. A., 658.

Benedict v. Arnour (154 New York, 715).

Gunster v. Scranton Illum, etc. (181 Penns. State, 327; 59 Amer. State Reports, 650).

Thompson Huston Electric Co. v. Capital Electric Co. (65 Fed., 341).

Hart v. Beer (74 Fed., 592).

Central Coal & Coke Co. v. Geo. S. Good & Co. (120 Fed., 793, 798).

See also a large number of cases cited on page 798 of last citation, and to notes of section 675, Pom. E. J.

Fidelity & Deposit Co. v. Courtney (186 Fed., 342, 362).

The courts have carefully confined the operation of the above exception to the condition described where a presumption necessarily arises that the agent did not disclose the facts to his principal because he was committing such independent fraud that concealment was necessary to its perpetration. It has never been extended beyond these circumstances. It follows, therefore, that every fraud of

an agent, in the course of his employment and in the very same transaction, does not fall within this exception; and most emphatically it does not apply when agent's fraud consists merely in his concealment of material facts within his own knowledge, from his principal.

Section 675, Pomeroy's Equity Jurisprudence.

Absolute deed given with a separate defeasance will always appear with a face of fraud.

Baker v. Wind (1 Ves. Sen., 160).

Jones on Mortgage (sec. 243).

In some States though the mortgage is by a deed absolute in form, the grantee acquires no legal title to the land.

Jones on Mortgage (sec. 342 C).

But in other States in which a formal mortgage is held not to pass the legal title, a deed absolute in form, intended to operate as a mortgage does not pass such title.

Jones on Mortgage (sec. 342 C).

THE IMPEACHMENT OF WITNESSES.

Certain objections interposed by the defendants in the examination of witnesses seem intended to suggest that the Government, having called the entry-men, is bound by what they say. This suggestion, if intended to be urged, proceeds upon a radical misconception of the rule of evidence respecting the impeachment of a witness by the party calling him.

The rule of evidence in any case goes no further than to inhibit an impeachment of the general reputation of a witness called by the party. If it ever was the law that a party was precluded to contradict his own witness, the rule in that form has been obsolete for a century; and for that period, at least, it has been competent to show the falsity of the party's own witness, even though such showing should incidentally reflect upon the veracity of the witness.

It is exceedingly clear that the party calling a witness is not precluded from proving the truth of any particular fact, by any other competent testimony, in direct contradiction to what such witness may have testified; and this, not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief.

1 Greenleaf on Evidence (sec. 443).

The primitive notion, that a party is morally bound by the statements of his witnesses, no longer finds defenders, although its disappearance is by no means very far in the past. In the early 1800's the judges were still engaged in repudiating this false notion of the basis of the rule against impeaching one's own witness.

Wigmore on Evidence (vol. 2, sec. 897).

Compare Wigmore on Evidence (vol. 2, sec. 898); *Alexander v. Gibson* (2 Campbell, 555); *Bradley v. Ricardo* (8 Bingham, 58); *Brown v. Bellows* (4 Pickering, 187); *Whitaker v. Salisbury* (15 Peck, 545).¹

Certainly the supposed rule of evidence is subject to the qualifications that the witness, whether or not he is impeachable by the other side, may be discredited by the court. And this is so especially where the witness himself supplies the material for his own impeachment.

In *McLean v. Clark* (31 Fed. Rep., 501), decided in 1887, District Judge Brown, since a Justice of the Supreme Court of the United States, said:

It is insisted, however, that as *McLean* (the plaintiff) was called as a witness by the defendants, they are bound by his statements that the transaction was bona fide and that Shaw has no interest in this suit. We do not so understand the law. While it is undoubtedly true, as a general rule, that a party offering a witness in support of his case represents himself as worthy of belief and will not be permitted to impeach his general reputation for truth or to impugn his credibility by general evidence, he has never been considered as bound by his general statements as to motives or intention, or his bona fides in a particular transaction, but may draw any inference from his testimony which the facts stated by the witness seem to justify. Particularly is this true where the party is compelled to prove his case from the mouth of the opposite party. In a similar case, *Chandler v. Town of Attica* (22 Fed. Rep., 625), Judge Wallace held, in passing upon a similar issue, that the court was "at liberty to disregard the testimony of the parties, so as it is incredible, and to interpret the transaction in a way consistent

with the ordinary conduct and motives of business men." If the story of the witness be consistent in itself, the party calling him is to a certain extent bound by his testimony, but if his recital of facts is inconsistent with his theory, the court is at liberty to draw its own inference from them.

Other cases asserting the right to cross-examine an unfriendly witness and to urge the incredibility of his testimony are:

United States v. Budd (144 U. S., 154 *supra*).

Becker v. Koch (104 N. W., 394).

Cross v. Cross (108 N. W., 628).

Arms v. Arms (113 N. W., 646).

Webber v. Jackson (79 Mich., 175).

Emerson v. Wark (185 Mass., 429).

Garny v. Katz (89 Wis.).

1 Starkie on Evidence, 284.

If one of these entrymen, being called as a witness for the Government, had sworn that he was a thousand years old, it may be conceded, *pro argumento*, that the Government would not be allowed to prove his real age. But no court would feel itself bound to accept such a statement, or to render a decree accordingly, upon the assumed theory that the complainant had vouched for the veracity of the witness. Granting all imaginable estoppels against the Government in this cause, the court, at least, is free to believe or disbelieve what the Government witnesses say.

In view of what has been said, showing the conceded hostility of the Government witnesses to the Government, their bias in favor of the defendants, which is disclosed throughout the cross-examination, the Government was frequently surprised in its direct examination, it is clear that counsel for complainant were entitled to cross-examine the witnesses called by them.

United States v. Budd (144 U. S., 154, *supra*).

Clark v. Saffery (Ryan & Moody, 126).

In proving what a man did, it is competent to show what he said when he was doing what is intended to be proven, although what he said may be immaterial to the fact done, or even though his declaration may be incompetent to prove the facts declared.

It being necessary to show that final proofs were made, the Government was obliged to show the fact by the exhibition of the proof papers, and this involved the production of the papers in their entirety. It was not competent in this instance, any more than in any other, to suppress supposedly immaterial portions of the paper, or to mutilate the documents for the sake of eliminating evidence presumed to be objectionable. Whether in any given instance particular statements are material to the present issues, or whether any certain matter is competent to prove some fact extrinsic to the proof, are questions for other considerations. The papers as a whole are necessary to establish the fact that the proofs were made, without regard to the intrinsic

competency or materiality or particular statements, and without regard to the proof of the papers in detail or as a whole.

Assuming, then, that some or all of the statements contained in the final proof papers are, taken independently, not proper matters of evidence, the papers must stand as competent to establish a fact material in the cause, and for that purpose the papers must stand in their integrity. If it should be proposed to refer to these papers for the sake of thereby ascertaining some fact other than the making of proof, the availability of any particular statement for any particular purpose is a question to be determined upon considerations applicable to the particular question.

In relating the transactions which are the subject of this litigation frequent mention has been made of statements made by entrymen in their final proof papers, and occasionally a fact is stated as shown by some entrymen's sworn declaration made in the course of his final proof. If in any or all of such instances the statements quoted are immaterial, or the facts stated are not properly proved by the quotations made, the statements and facts are, of course, not to be considered in tracing the history of the transactions.

The narrative itself, it is believed, will in every instance show its own justification for the use made of the final proof. In all cases where the entrymen were examined, their proof papers were shown to them and were identified by them as their sworn dec-

larations made by themselves in the course of the entries. In these and all other cases the proof papers, being documents required by law to be prepared and filed, and having become a part of the official record, are evidence of the fact that the statements contained in the papers were made in the prosecution of the claim. The competency of such evidence to prove that the statements were made is as clear as the competency of any other records to prove their own contents. In any situation, therefore, where it is material to know what one of these entrymen said on final proof, the papers are competent evidence. In any case where it is material to ascertain the fact to which testimony was given at final proof, the entryman's sworn statement as to that fact made contemporaneously, or nearly so, with the fact itself, is manifestly evidence, of more or less persuasiveness according to the declarant's veracity, and the account heretofore given of the transactions in suit shows in repeated instances how the narrative is made clear, and how incidents otherwise obscured are eliminated, by reference to the statements of entrymen in final proof. The use of the final proof is requisite to an intelligible statement and complete understanding of what the defendants did; and the motion was evidently urged, not because the aid thus afforded to the narrative is immaterial, but because of its peculiar and especially detrimental materiality.

The materiality which inspires this objection lies in the fact that many of the entrymen swore falsely

as to the various matters in their final proof. Such falsehood relates not only to the fact that they had, before making proof, sold or bargained to sell their lands, but to other matters as well, such as the manner in which they had obtained money to pay for the land, how long they had had their money, the extent and sources of their current income, and similar things, all bearing more or less directly upon the good faith of the proceeding.

If this falsehood in the final proofs is really immaterial, then it does not at all concern the defendants. If the fact that the entrymen, through whom the defendants claim, were guilty of fraud in obtaining their titles has any possible tendency to prove fraudulent purpose or fraudulent practice on the part of the defendants, then that falsehood is highly material.

Some surprise would be caused by the proposition that the purchaser of a fraudulently acquired title could not be, in any case, affected by the known fraud of his vendor in acquiring the title. If these entries were made in fraud of the law, and the defendants bought, knowing that fact, counsel will not suggest that the fraud did not vitiate their titles. If the fact be that the defendants themselves, intending a fraud upon the law, caused the entries to be made in falsehood, it is preposterous to say that the fact of falsehood can not be shown. Nor will it be even argued that falsehood on the part of the entrymen does not tend to prove fraudulent purpose on the part of those who procured the entries to be made,

and, in any view of the case, the fact that the entrymen secured their titles by fraudulent means would at least create a presumption of fraud against the defendants which it would be incumbent upon the latter to rebut. In this instance the defendants have felt themselves obliged to offer copious testimony to establish their own innocence—an undertaking which would have been wholly unnecessary unless the very proof now pronounced immaterial had warranted inferences against the defendants which they were advised must be defeated.

One of the material averments of bill is to the effect that the defendants conspired to obtain titles from the United States by fraud, falsehood, deceit, and imposition upon the land officers and that the titles were actually obtained by such means.

The obviously proper method to prove this averment is to produce the final proofs and to show that they contain falsehoods. If the proofs can not be used for this purpose, the fact alleged is impossible of proof. To say that the falsehoods embodied in the final proofs are immaterial is to say that no such averment can ever be proved, and that every fraud upon the United States affected by means of false proof is necessarily unsusceptible of correction.

Counsel, being of course indisposed to go the length of this absurdity, will limit their objection to that particular falsehood in the final proofs whereby the entrymen denied that they had previously sold or agreed to sell the lands, that being the particular fraud which was held in the Williamson decision to

be immaterial in that particular case. But this is not an objection to the final proof as a whole, but only to a single and comparatively unimportant statement embedded in a mass of other statements, all equally false. At any rate, the objection would be available only as against the particular unauthorized statement, if anyone think it worth while to descend into such particularity in such a mass of falsehood.

Williamson v. United States (207 U. S., 424) was an indictment for conspiracy to commit subornation of perjury. In that case it was held that a given paper did not prove perjury in another paper. That is a very different thing from saying that the same paper may not in another case and upon a different issue tend to prove something else.

To say that false swearing, when proof of swearing is not required by law, does not constitute perjury falls far short of saying that the same false swearing may not amount to deceit and constitute a fraudulent means of effecting a fraudulent purpose. So far as the present bill proceeds upon averments of perjury in the final proofs, if there are such averments in the bill, it may be conceded that the false statements at final proof as to alienation do not tend to prove those averments, and that is as far as the *Williamson* case can touch the present cause. But so far as the bill alleges fraud, fraudulent purpose, the use of fraudulent means, misrepresentations, imposition upon the land officers, and the obtaining of titles by falsehood, deception, deceit, and fraud, which facts are the gravamen of the bill, the false swear-

ing at final proof is plainly competent to prove such averments, and is palpably material to the issue presented.

THE FINAL PROOFS.

The admission of final proofs was objected to on the ground that they were incompetent, irrelevant, and immaterial.

The objection to the final proof papers, which is obviously in the mind of moving counsel, is the ruling in the Williamson case, *supra*, to the effect, as assumed, that the admission of such papers is erroneous. Conceding, for immediate purposes of argument, that this is a correct understanding of the proceeding referred to, it will be observed that the language of the decision relates, not to final proof generally, or even to the competency of final proof in that particular case, but to certain affidavits offered as a part of the final proof in that case, but which the court held were not properly required as final proof. The matter held objectionable was not the statutory final proof, but matter which in the decision itself is adjudicated not to be final proof at all. If, therefore, the authority of the Williamson case is relied upon to support this branch of the motion, the motion must be limited to any portion of the papers here put in evidence as final proof, which portion is no more than the affidavit which in that case was held incompetent to prove the issue in that case. Beyond these affidavits the Williamson decision does not go, even for the purposes of the precise question before the court.

The statements held in the Williamson case to be beyond the power of the General Land Office to require at proof related to the applicant's alienation of the land intermediate his application and his proof. In the entries involved in the present case statements as to this fact were taken by the local officers as part of the final proof, and in connection with the claimant's testimony concerning other matters which also were part of the final proof. The statute required final proof to be made, and prescribes that it shall cover certain designated matters, of which the alienation of the land before the date of proof is not one.

It is respectfully submitted that the decrees of the District Court should be reversed and that the cause be remanded to that court with instructions to enter decrees to the effect that the patents issued to the several entrymen named in the three bills of complaint as amended, with the exception of those issued which we have herein conceded the evidence does not justify a cancellation of the patents, be avoided and canceled.

PEYTON GORDON,

Special Assistant to the Attorney General,

Solicitor for Appellant.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant, No. 2209
vs.

William F. Kettenbach, George H. Kester,
Clarence W. Robnett, William Dwyer, and
Frank W. Kettenbach, Appellees.

THE UNITED STATES OF AMERICA,
Appellant, No. 2210
vs.

William F. Kettenbach, George H. Kester,
Clarence W. Robnett, William Dwyer, The
Idaho Trust Company, a Corporation, The
Lewiston National Bank, a Corporation,
The Clearwater Timber Company, a Cor-
poration, Elizabeth W. Thatcher, Curtis
Thatcher, Elizabeth White, Edna P. Kes-
ter, Elizabeth Kettenbach, Martha E. Hal-
lett, and Kitty E. Dwyer, Appellees.

THE UNITED STATES OF AMERICA,
Appellant, No. 2211
vs.

William F. Kettenbach, George H. Kester,
and William Dwyer, Appellees.

Brief for Frank W. Kettenbach, Appellee in No.
2209 and for Clearwater Timber Company, Idaho
Trust Company, and Lewiston National Bank and
Potlatch Lumber Company, Appellees in No. 2210.

JAMES E. BABB,
Lewiston, Idaho,
Solicitor for said Appellees.

PEYTON GORDON,
Solicitor for Appellant.

Appeals from the Distriirt Court of the United States
for the District of Idaho, Central Division.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
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vs..

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THE UNITED STATES OF AMERICA,
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vs.

William F. Kettenbach, George H. Kester,
Clarence W. Robnett, William Dwyer, The
Idaho Trust Company, a Corporation, The
Lewiston National Bank, a Corporation,
The Clearwater Timber Company, a Cor-
poration, Elizabeth W. Thatcher, Curtis
Thatcher, Elizabeth White, Edna P. Kes-
ter, Elizabeth Kettenbach, Martha E. Hal-
lett, and Kitty E. Dwyer, Appellees.

THE UNITED STATES OF AMERICA,
Appellant, No. 2211
vs.

William F. Kettenbach, George H. Kester,
and William Dwyer, Appellees.

Brief for Frank W. Kettenbach, Appellee in No.
2209 and for Clearwater Timber Company, Idaho
Trust Company, and Lewiston National Bank and
Potlatch Lumber Company, Appellees in No. 2210.

JAMES E. BABB,
Lewiston, Idaho,
Solicitor for said Appellees.
PEYTON GORDON,
Solicitor for Appellant.

Appeals from the Distriirt Court of the United States
for the District of Idaho, Central Division.

I.

GENERAL STATEMENT.

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Nos. 2209, 2210, and 2211.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant,

vs.

No. 2209

William F. Kettenbach, George H. Kester,
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Frank W. Kettenbach,
Appellees.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

No. 2210

William F. Kettenbach, George H. Kester,
Clarence W. Robnett, William Dwyer, The
Idaho Trust Company, a Corporation, The
Lewiston National Bank, a Corporation,
The Clearwater Timber Company, a Cor-
poration, Elizabeth W. Thatcher, Curtis
Thatcher, Elizabeth White, Edna P. Kes-
ter, Elizabeth Kettenbach, Martha E. Hal-
lett, and Kitty E. Dwyer,
Appellees.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

No. 2211

William F. Kettenbach, George H. Kester,
and William Dwyer,
Appellees.

Brief for Frank W. Kettenbach, Appellee in No. 2209 and for Clearwater Timber Company, Idaho Trust Company, and Lewiston National Bank and Potlatch Lumber Company, Appellees in No. 2210.

GENERAL STATEMENT.

I.

The defendant F. W. Kettenbach, No. 388, had no interest in any of the property, and filed an answer and disclaimer (Vol. 12, p. 97). The defendant Potlatch Lumber Company (Answer Vol. 12, p. 4337), and Clearwater Timber Company (Answer Vol. 12, p. 4366), No. 406, had acquired by purchase in the ordinary course of business, a few of the claims in question, and they have answered, setting up their position as bona fide purchasers without notice. Appellant having made no assignments (Vol. 12, p. 4545) against the finding of the bona fides of the purchases made by Potlatch Lumber Company, and no citation having been addressed to it (Vol. 12, p. 4565), no further attention to their interests is necessary. The Idaho Trust Company (Answer Vol. 12, p. 4355), and Lewiston National Bank (Answer Vol. 12, p. 4323), defendants in No. 406 (No. 2210 here), acquired a lien on portions of the property in question to secure the payment of money, and have filed answer setting forth that they acquired such liens in good faith and without notice of illegality. The defendant Lewiston National Bank also acquired title to a few claims, same having been taken for indebtedness, and has in its answer set forth that it

acquired title to these claims in good faith for value without notice.

The first complaint filed in any of these cases was that in No. 388, filed October 14, 1907 (Vol. 1, pp. 3-29), and the *Lis Pendens* was filed in the action October 16, 1907 (Vol. 4, pp. 1463-68). All of the bona fide purchases and bona fide liens acquired and relied upon by these defendants were acquired before the date of the commencement of any of these suits. The complaints in Nos. 406 (No. 2210 here) and 407 were not filed until the 4th of September, 1909 (Vol. 12, pp. 4225, and Vol. 13, pp. 4575), practically two years after the filing of complaint in No. 388, which, even, was filed after the closing of all of the transfers which are claimed to have been made bona fide and for value by these defendants.

The complaint in No. 388 attacked the validity of fifty-four separate patents (see pages 10 to 16 of original complaint) (Vol. 1, pp. 3-29); the complaint in this case was amended May 22, 1909, by striking out thirty-seven of the fifty-four patents attacked in the original complaint (Vol. 1, pp. 50-86). These were stricken out on the 22nd day of May, 1909, at the time of the filing of the amended complaint, which left out these thirty-seven patents of the fifty-

four which had been attacked in the original complaint (Vol. 1, pp. 50-86).

On the 4th day of September, 1909, the Government changed its mind with reference to portions of these claims stricken out, and abandoned, and filed a new suit, No. 406 (No. 2210 here), equity, in which it included again a large portion of those patents which had been stricken out by amendment (Vol. 12, p. 4225), but left out permanently and abandoned totally the attack of patents of Henderson H. Disney, H. S. Palmer, George W. Herrington, Robert N. Wright, Maud N. Wright, John W. Killinger, and George H. Kester, and added the patents to the following persons, which had not been previously attacked: Cornell, Lambdin, and Shaeffer (these claims sold to Potlatch Lumber Company, whose title is *now* conceded as above stated), and later, by amendment, the patent to Robert Waldman was added March 8, 1910 (Vol. 12, p. 4414. An additional complaint, No. 407, was filed September 4, 1909 (Vol. 13, p. 4575), and it included patents to the following persons, which had not been previously attacked: Charles A. Meyers, Jennie Myers, Mary A. Loney, Charles E. Loney, Mary Jolly, James T. Jolly, K. E. Perkins, and F. J. Bonney.

The patents to properties in which these purchasers became interested were all issued between the 20th of November, 1902, and the 31st of December, 1904. These patents were allowed to stand of record evidencing good and ample titles to the general public without any question on the part of the Government until the 14th day of October, 1907, and the attack then made was very largely cleared of record by amendment of complaint made the 22nd of May, 1909, after two years, without, we might say, any steps taken on the part of the Government to show its confidence in the attack it had made, in the complaint which it had filed in October, 1907.

The delay in proceeding on the part of the Government is the more significant when it is considered that the Government had procured indictments affecting some of the entries as early as July 13, 1905 (Vol. 11, p. 4000), and must therefore have been in possession of information for a considerable time prior to the 13th of July, 1905. All these indictments have now been either dismissed or verdicts of "not guilty" rendered thereon, so that it stands confessed of record, so far as the criminal side of the Court is concerned, that there has been no criminality in connection with any of these entries. This fact may shed some light, doubtless, sheds, considerable light,

on the cause of delay in the commencement of attack on the civil side of the Court, and the vacillation characterizing same by dismissal and re-making of charges.

The attorney for these lien and title claimants, on whose behalf this brief is submitted, as well as Frank W. Kettenbach, one of the defendants who disclaims any interest in the property, has not deemed it necessary to take any particular interest in the issues pending between the Government and the original entrymen or alleged co-conspirators with the original entrymen. These defendants have left the evidence upon that feature of the case for presentation by the original entrymen and the alleged co-conspirators, and will also leave the discussion of that feature of the case to the attorneys representing those parties.

These defendants in their answers simply put the Government upon proof as to those matters and alleged the bona fide purchases and incumbrances and offered proof in support thereof.

Counsel for these defendants, however, attended a few of the sessions, and listened to a few different branches of the testimony of the entrymen and others, for the purpose of getting a fair conception of the nature of the issues between the Government

and the entrymen and their alleged co-conspirators. From the impressions derived from the testimony given at these hearings, especially when coupled with the fact that the issues now submitted on the civil side were submitted on the criminal side (Indictments 605, 607, 615, Vol 11, pp. 3982-4005), to a jury of twelve men who returned a verdict of "not guilty" (Vol. 11. p. 4180). Counsel for these defendants holds a decided impression that the case of the Government on these issues even if not concluded by the verdict rendered in the criminal case, is wholly defeated by the doctrine that in this class of cases to justify a decree for complainant the evidence in the case must make a case for complainant that is entirely satisfactory to the chancellor and as expressed in many of the authorities makes out a case beyond a reasonable doubt. Counsel for these defendants has tried a number of cases dependent upon these principles, and from the impression derived in this class of cases is unable to admit that the record in this case is entirely satisfactory in favor of complainant, to the conscience or the mind of the chancellor in any view that can be taken of it. What is meant by being entirely satisfactory and by being established beyond a reasonable doubt? For the mind and conscience to be satisfied, all questions, misgiving and

hesitations, in the chancellor's mind and conscience must be silenced. Until this is done, the mind and conscience is not satisfied. The case must be such, that when it is decided by the chancellor, it is done without a hesitation, or a reasonable doubt, or question, and when it is done, it must have been so satisfactorily done, that no reasonable doubt of it will ever return to the mind or conscience. This is precisely the form of argument which was submitted for these defendants to the Supreme Court of Idaho in *Rice vs. Rigley*, 7 Idaho, page 127, when the Court, reversing a judgment granted below for the complainant, decreed:

"As to the law of the case, counsel for appellants contends that, as respondents are seeking to hold the appellants as trustees of an undivided one-half of said mining claims, and to enforce the specific performance of an alleged prospector's or grubstake contract, respondents cannot have a decree upon a bare preponderance of the evidence, and that they are not entitled to a decree unless their case has been clearly and satisfactorily proven, and all doubts cleared up; while counsel for respondents contend that in this class of cases the rule is well established that a mere preponderance of the evidence is all that is required. The trial court held that a preponderance of evidence was all that was necessary to establish plaintiff's case. Counsel for appellants cite and quote from a large number of authorities in support of their contention. Counsel for respondents contend

that nearly every case cited by appellants was an action to reform a written deed or instrument, or to have a trust declared contrary to the specific terms of a written instrument, and are not applicable to the case at bar. Counsel, however, concede that the cases of *Proudfoot vs. Wightman*, 78 Ill. 556, and *Dewey vs. Land Co.*, 98 Wis. 83, 73 N. W. 536, require explanation, and those cases are explained by counsel by suggesting that the decisions in those cases are "simply the opinion of the court as to what the rule ought to be." We think, however, the correct rule is stated in those cases. After a most thorough examination of this question, and of the authorities cited, we conclude that the rule is well settled in a case like the one at bar, that something more than a bare preponderance of the evidence is required to entitle the plaintiffs to a decree declaring a resulting trust and for specific performance. In the first case above cited the court says: 'In any ordinary chancery case a complainant is required to establish the allegations of the bill by a preponderance of the evidence, but in a case of this character * * * something more than a bare preponderance should be required.' In *Dewey vs. Land Co.*, supra (which was a case to enforce specific performance of an oral agreement to convey land), it is said: "Specific performance is not a matter of strict right, but rests in the sound discretion of the court, and the contract sought to be enforced must be fully and clearly proved in all its parts. A mere preponderance of evidence is not sufficient.' It is held in *Printup vs. Mitchell*, 17 Ga. 567, that a parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the

agreement. In *Johnson vs. Quarles*, 46 Mo. 423, the plaintiff attempted to establish a resulting trust in land, and the court used the following language as to the evidence introduced, to-wit: 'While admitting such evidence for the purpose of creating this resulting trust, the chancellor has always required that it be clear and unequivocal.' 'The insecurity of titles, and the temptation to perjury, among the chief reasons demanding that contracts affecting lands should be made in writing, also imperatively require that trusts arising by operation of law should not be declared upon any doubtful evidence, or ever upon a mere preponderance of evidence. There should be no room for a reasonable doubt as to the facts relied upon.' (See, also, *Ringo vs. Richardson*, 53 Mo. 385; *Barbour vs. Barbour*, 51 N. J. Eq. 271, 29 Atl. 148; *Association vs. Brewster*, 51 Tex. 263; 2 *Pomeroy's Equity Jurisprudence*, Sec. 1040.) As to the evidence necessary to establish a resulting trust in land, the court, in *Reynolds vs. Caldwell*, 80 Ala. 232, said: 'The rule is that a trust of this nature, sought to be ingrafted upon lands by parol evidence, and such as result by operation of law must be supported by testimony not only entirely satisfactory, but clear and undoubted,' * * * 'the evidence must be satisfactory, clear and convincing. It must be so clear and certain as to leave no well-founded doubt in the mind of the court. The evidence of the respondents, when tested by that rule, will not entitle them to a decree.'

This case is still approved by the Supreme Court of Idaho, (see 152 Idaho 391-2, also 582), and corresponds with the many Federal decisions cited and

amply quoted from in the brief being submitted in this cause for the principal defendants. But it should not be overlooked that in the Maxwell Land Grant case, 121 U. S. 325, the court said this doctrine was applicable with added force and energy in a suit to set aside a patent to lands.

If this were an ordinary case the foregoing doctrine would dispose of it. The case is extraordinary in a court of equity, especially in this kind of a case, in that complaint in a court of equity presents a case where such proof is required, basing it upon the testimony of an unquestioned and unrepentant embezzler and perjurer (Opinion of Dietrich, J., Vol. 1, pp. 258-266). More than that, this witness had before his embezzlement, testified the other way and after arrest for embezzlement, went to the Government, admitting that he hoped for advantage thereby, but still more, after the Government representative in this case, in equity.—faced the court and gave an assurance of having no knowledge of any promise of immunity, the witness plead guilty to embezzlement of over 100,000 dollars and was promptly pardoned by the President, evidencing, as Judge Dietrich asserts, a prearranged immunity (Vol. 1, p. 264) which, even if not communicated to the Government's attorney in this case,

would operate to impose upon the court or conceal from the court knowledge of the immunity arrangement. No representative of the Government has, under oath, denied as a witness in this case the contract for immunity. Has a complainant ever gained standing in a court of equity, in this kind of a case, on such testimony, presented under such circumstances of concealment and lack of good faith? The Government's representatives, weighted down with the customs of the criminal court, where the Government may make a contract for testimony, promising an embezzler his liberty therefor, have apparently without realizing what they have done, brought such a witness, under such circumstances, to the support of a complainant in a court of equity. While such an agreement is within the power of a prosecutor in a criminal court, in a court of equity—or even of law, on its civil side, such an arrangement is a high crime, and there is as much evidence that such an arrangement was made for use in this case, as there is of many of the charges the Government is making in this case. The issues thereafter being decided against the Government by verdict in criminal cases have been decided by the court below, after seeing the witnesses, so that whatever the views of this court, the issue could not be considered as

clearly or satisfactorily established for the Government. In such a case this court declared the well settled rule October 7, 1912, in the *Vanderbilt vs. Bishop*, 199 Fed. 420 as follows:

“Findings of the trial judge in an equity suit, based on the evidence of witnesses before him and resulting in a substantial conflict, with respect to the material issues, will not be set aside on appeal.”

II.

F. W. KETTENBACH.

Defendant, F. W. Kettenbach, in No. 388 filed an answer and disclaimer.

The evidence shows that F. W. Kettenbach had no connection of any nature with any of the patents or the titles evidenced thereby attacked in the amended complaint in No. 388. Furthermore, it is conceded, and the evidence discloses, that F. W. Kettenbach was in no way connected with George H. Kester, William F. Kettenbach, William Dwyer and Clarence W. Robnett in any of their timber land investments or enterprises. See testimony of C. W. Robnett on cross-examination by James E. Babb, last half of pages 2343-2345, where in part he testified as follows:

“Q. He wasn't a party to any of these business transactions, was he?

A. Not to my knowledge, in regards to the boys' timber at that time.

Q. He wasn't interested in securing timber?

A. I don't know as he was; he wasn't at least working with the boys in regards to their claims.

Q. You never had any dealings with him in regard to timber locations, and securing title to timber lands?

A. No, I did not.

Q. Not a bit, did you?

A. Not to my recollection.

Q. You knew he wasn't in business, didn't you?

A. Why, he wasn't in a way, but he was at the time that he took those two claims.

Q. What business was it?

A. Buying the tie timber; he was furnishing some tie contracts to the railroads and I didn't know but what he had an interest.

Q. Which one of these claims did he have an interest in?

A. He had no interest as far as having an interest in those things, but you said about having to do with the timber.

Q. He had no interest in anything you testified about, did he?

A. Not until the time he took them over for the bank.

Q. I am talking about a personal interest; he didn't have any interest in any claims you have been testifying about?

A. Not to my knowledge.

Q. He didn't loan any money even for any of the boys?

A. I don't personally know what he did.

Q. *Just name one where he had an interest?*

A. I don't know as I can recall any one at the present time.

Q. Then you don't know of any claim where he loaned money or had any interest of any nature, do you?

A. Well, not from him, I don't.

Q. *Do you know of any, the question is do you know of any such claims in which he had an interest, or for the securing of which he loaned any money?*

A. Personally, I do not.

William Haevernick and Alma Haevernick, husband and wife, each acquired a timber claim. They, at least William Haevernick, was interested with Mr. Frank W. Kettenbach in the Orofino Trading company, a corporation of Orofino, Idaho, and they became indebted to Mr. F. W. Kettenbach and sold him their two timber claims. This indebtedness was wiped out in the transaction. Neither Kester, nor Dwyer, nor W. F. Kettenbach, had any connection with the Orofino Trading Company, or with the Haevernicks, or with their timber claims, and there is nothing in connection with these claims that makes any of the evidence about them relevant under the charge in the complaint of conspiracy between W. F. Kettenbach, Kester, Dwyer, and Robnett. Mr. F. W. Kettenbach after acquiring these Haevernick claims sold them to the Clearwater Timber Company, as will appear more fully later on. The testimony of the Haevernicks appears in Vol. 2, pp. 470-489, and clearly shows that their claims were taken up of their own motion and without any arrangement with Mr. F. W. Kettenbach, or anyone else. There is no evidence of illegality in connection with same, and he had disposed of them to the Clearwater Timber Company by deed recorded July 13, 1907, before the first complaint was filed in No. 388 (Vol. 11,

pp. 4104-5), and his disclaimer therefore should be sustained and the decree dismissing the cause is correct as to him. Judge Dietrich found no evidence even of the illegality of either of those entries (Vol. 1, pp. 283-4). The Government has offered in evidence an anonymous Campaign Circular circulated in a political campaign in 1904 (Vol. 11, pp. 4020-4026), in which this litigation had its origin, also newspaper publications in support of the same propaganda (Vol. 11, p. 4627)) and affidavit of Frank W. Kettenbach (Vol. 11, pp. 4042-4060). After seeing from the evidence in this case that Frank W. Kettenbach had nothing to do with any of these land transactions, note the moral character of those supporting it including the Government representatives who would cause publication of Frank W. Kettenbach at all times, including even his picture as one of the land fraud "Trio" (Vol. 11, pp. 4023, 4053 and 4057). and Vol. 10, p. 3603. The representative of the paper printing those falsehoods was not on speaking terms with F. W. Kettenbach and was the constant companion of the Government Special Agents, Robnett was in the hands of those parties all the time. The Court cannot properly weigh the testimony and methods used without consideration of all those circumstances.

III.

POTLATCH LUMBER COMPANY.

The Potlatch Lumber Company is defendant in No. 406. It acquired the claims of Lambdin, Cornell, and Shaeffer, and is alleged in the complaint to have acquired the same with notice of alleged illegality in obtaining patents thereto. The evidence as to its purchases is Wm. Deary Vol. 9 pp. 3521-3537, Vol. 11, pp. 4115 and 4116, and 4202 and 3 and Vol. 10, pp. 3692-93 Vol. 5. The Government in the court below abandoned its contest against Potlatch Lumber Company.

The Court having found that this Company was a bona fide purchaser and no citation having been issued to or served upon them and no assignment of error having been made against such finding, there is nothing requiring any further consideration thereof and any action in this court cannot operate to reverse the finding in their favor below.

IV.

CLEARWATER TIMBER COMPANY.

Clearwater Timber Company, prior to the commencement of any of these suits, acquired title for valuable consideration in the ordinary course of Business and without any notice of illegality, to the claims patented to *William B. Benton, Joel H. Benton, Pearl Washburn, William Haevernick, Alma Haevernick* and *Geary VanArtsdalen*. All of these claims were purchased and deeds recorded long before the filing of any suit by the Government, and after the patents had been resting uncontested on the public records from three to five years while the transferees had, in various instances as shown by the public records, been transacting business with other bona fide mortgagees and transferees. The following is a complete chain of the title to these claims as shown at Vol. 4, pp. 1477-1481, 1489-1490 (and Vol. 12, pp. 4258 and 4259), 1512-1515.

WILLIAM B. BENTON, T. & S. 4054.

Description: S 1-2 NW 1-4, N 1-2 SW 1-4, Sec. 15,
T. 39 N., R. 3 E., B. M.

THE UNITED STATES

to

WILLIAM B. BENTON

RECEIVER'S RECEIPT.

Dated Nov. 21, 1902.

Recorded April 27, 1903,
Book D-2, p. 131, Nez
Perce County, at request
of Shoshone Abstract Co.

WILLIAM B. BENTON

to

DEED.

C. W. ROBNETT.

Consideration, \$1600.00.

Dated Jan. . . , 1902.

Acknowledged Jan. 10, 1903, before Otto Ket-
tenbach, N. P., Nez Perce County, Idaho.

Recorded April 27, 1903, Book 83 1-2, p. 87,
Nez Perce County, at request of Shoshone
Abstract Co.

Witness: Otto Kettenbach, E. C. Smith.

CLARENCE W. ROBNETT, and

JENNIE M. ROBNETT, Wife,

to

O. E. GUERNSEY, Dubuque, Iowa.

Mortgage, \$125.00.

Dated March 15, 1904.

Acknowledged March 15, 1904, before Jno. E.
Nickerson, N. P., Nez Perce County, Idaho.

Recorded March 21, 1904, Book 76, p. 532, Nez
Perce County, at request of Shoshone Ab-
stract Co.

Released in Book 57, p. 364; Book 59, p. 392.

UNITED STATES

to

PATENT

WILLIAM B. BENTON

Dated Feby. 25, 1904.

Recorded May 9, 1906, Book 38, p. 111, Nez Perce County, at request Lewiston Abstract Co. Delivered to Lewiston Abstract Co.

UNITED STATES

vs.

LIS PENDENS

WILLIAM K. KETTENBACH, et al

Recorded Oct. 16, 1907, Book 1, p. 211, records of Nez Perce County, Idaho, request U. S. Attorney. Description same as above and other property.

C. W. ROBNETT and
JENNIE M. ROBNETT, Wife,

to

DEED.

ELIZABETH WHITE.

Consideration, \$1.00.

Dated July 8, 1907.

Acknowledged July 8, 1907, before C. H. Lingenfelter, N. P., Nez Perce County, Idaho. Recorded July 8, 1907, Book 93, p. 490, Nez Perce County, Idaho, at request of Lewiston Abstract Co. and delivered to Lewiston Abstract Co.

Witnesses: Mamie Eichenberger, C. H. Lingenfelter.

Description same as above and other property.

ELIZABETH WHITE, Widow,
to
CLEARWATER TIMBER COMPANY,
a Corporation.

Warranty Deed, \$1250.00

Dated Sept. 4, 1907.

Acknowledged Sept. 4, 1907, before John D. McConkey, N. P., Nez Perce County, Idaho.

Recorded Sept. 16, 1907, Book 94, p. 57, at request of F. J. Davies.

Description same as above and other property.

Witnesses: J. D. McConkey and J. F. Pickering.

JOEL H. BENTON, T. & S. No. 4055.

Description: S 1-2 SW 1-4, S 1-2 SE 1-4, Sec. 15, T. 39 N. R. 3 E. B. M.

UNITED STATES

to

RECEIVER'S RECEIPT

JOEL H. BENTON,

Dated November 21, 1902.

Recorded April 27, 1903, in Book D-2, p. 131,
at request of Shoshone Abstract Co.

JOEL H. BENTON, and
LIDA ALICE BENTON, Wife,

to

DEED.

C. W. ROBNETT,

Consideration, \$1600.00.

Dated December 29, 1902; acknowledged December 29, 1902, before Otto Kettenbach, N. P., Nez Perce County, Idaho.

Recorded April 27, 1903, Book 83 1-2, p. 88, Nez Perce County, at request of Shoshone Abstract Co.

Description same as above.

Witness: Otto Kettenbach.

UNITED STATES

to

PATENT

JOEL H. BENTON,

Dated February 25, 1905.

Recorded May 9, 1906, in Book 38, p. 112, Nez
Perce County, at request of Lewiston Ab-
stract Co.

Description same as above.

C. W. ROBNETT and

JENNIE M. ROBNETT, Wife,

to

DEED.

ELIZABETH WHITE,

Consideration, \$1.00.

Dated July 8, 1907; acknowledged July 8,
1907, before C. H. Lingenfelter, N. P., Nez
Perce County, Idaho.

Recorded July 8, 1907, Book 93, p. 480, Nez
Perce County, at request Lewiston Abstract
Co.

Description same as above.

Witnesses: Minnie Eichenberger, C. H. Ling-
enfelter.

ELIZABTEH WHITE, Widow,

to

WARRANTY DEED.

CLEARWATER TIMBER COMPANY,

Corp. of State of Washington,

Con. \$1600.00.

Dated Sept. 4, 1907; acknowledged Sept. 4,
1907, before John D. McConkey, N. P., Nez
Perce County, Idaho.

Recorded Sept. 16, 1907, Book 94, p. 58, Nez
Perce County, at request of T. J. Davies.

Delivered to T. J. Davies.

Witnesses: J. D. McConkey, J. F. Pickering.

UNITED STATES

vs.

LIS PENDENS

WILLIAM F. KETTENBACH, et al.

Recorded Oct. 16, 1907. Book 1, p. 211, Nez
Perce County.

Description same as above and other property.

PEARL WASHBURN, T. & S. No. 4306.

Description: E 1-2 SE 1-4, SE 1-4 NE 1-4 Sec. 27,
T. 40 N., R. 4 E., B. M.

UNITED STATES

to

RECEIVER'S RECEIPT.

PEARL WASHBURN.

Dated April 16, 1903.

Recorded April 18, 1903, Book B-2, p. 131, at
request of W. F. Kettenbach.

PEARL WASHBURN and

CHARLES O. WASHBURN, Husband,

to

Mortgage, \$400.00

W. F. KETTENBACH.

Dated April 16, 1903.

Acknowledged April 16, 1903, before H. K.
Barnett, N. P., Nez Perce County, Idaho.

Recorded April 18, 1903, Book 76, p. 420, at
request of W. F. Kettenbach.

Released June 5, 1907, Book 59, p. 351.

PEARL WASHBURN and
 CHARLES O. WASHBURN, Husband,
 to DEED.
 JAMES B. McGRANE.

Consideration, \$900.00.

Dated May 23, 1906.

Acknowledged Oct. 31, 1906, before J. H. Smith, N. P., Los Angeles, Cal., and before A. W. Ewing, N. P., Los Angeles, Cal.

Recorded Nov. 9, 1906, Book 89, p. 496, at request J. B. McGrane.

Delivered to J. B. McGrane.

UNITED STATES
 to PATENT
 PEARL WASHBURN.

Dated July 2, 1904.

Recorded May 6, 1907, Book 38, p. 316, at request Lewiston Abstract Company, and delivered to Lewiston Abstract Co.

PEARL WASHBURN and
 CHARLES O. WASHBURN, Husband,
 to Quit Claim Deed.
 JAMES B. McGRANE.

Consideration, \$1.00.

Dated May 31, 1907.

Acknowledged May 31, 1907, before J. H. Smith, N. P., Los Angeles, Cal.

Recorded June 6, 1907, Book 86, p. 300, at request Lewiston Abstract Co., and delivered to Lewiston Abstract Co.

JAMES B. McGRANE and
EDNA McGRANE, Wife,
to
JOHN E. CHAPMAN.

DEED.

Consideration, \$7,500.00.

Dated May 8, 1907.

Acknowledged May 8, 1907, before Chas. L.
McDonald, N. P., Nez Perce County, Idaho.

Recorded June 6, 1907, Book 93, p. 421, at re-
quest Lewiston Abstract Co.

Above described land and other property.

JOHN E. CHAPMAN, Single,
to

Warranty Deed

CLEARWATER TIMBER COMPANY.,
a Corporation.

Consideration, \$8,650.00

Dated June 7, 1907.

Acknowledged June 7, 1907, before Chas. L.
McDonald, N. P., Nez Perce County, Idaho.

Recorded June 21, 1907, Book 88, p. 579, at re-
quest of F. J. Davies, and delivered to F. J.
Davies.

Above described land and other property.

UNITED STATES

vs.

LIS PENDENS

WILLIAM F. KETTENBACH, et al.

Recorded Oct. 16, 1907, Book 1, p. 211.

WILLIAM HAEVERNICK, T. & S. No. 4635
ALMA HAEVERNICK, T. & S. No. 4636.

Description: SE 1-4 SE 1-4 Sec. 23, NE 1-4 NE 1-4
Sec. 26, T. 37 N., R. 2 E., B. M. SW 1-4 NE 1-4 Sec.
26, T. 37 N., R. 2 E., B. M.

THE UNITED STATES to
WILLIAM HAEVERNICK

THE UNITED STATES to
ALMA HAEVERNICK.

Patent Dated Nov. . . , 1904.

WILLIAM HAEVERNICK and
ALMA HAEVERNICK,

to Warranty Deed.
FRANK W. KETTENBACH.

Consideration, \$650.00.

Dated June 3, 1904.

Acknowledged June 14, 1907, before Ray C.
Hyke, N. P., Nez Perce County, Idaho.

Recorded June 14, 1907, Book 88, p. 574, at re-
quest Lewiston Abstract Co.

Delivered to Lewiston Abstract Co.

FRANK W. KETTENBACH and
AMY D. KETTENBACH,

to Warranty Deed.
CLEARWATER TIMBER CO.

Consideration, \$800.00.

Dated June 12, 1907.

Acknowledged June 14, 1907, before Ray C.
Hyke, N. P., Nez Perce County, Idaho.

Recorded July 13, 1907, Book 88, p. 607, at re-
quest F. J. Davies.

UNITED STATES

vs.

LIS PENDENS.

WILLIAM F. KETTENBACH, et al.

Recorded Oct. 16, 1907, Book 1, p. 211.

Description: SE 1-4 SE 1-4 Sec. 23; NE 1-4
NE 1-4 Sec. 26, T. 37 N., R. 2 E., B. M.

GEARY VAN ARTSDALEN, T. & S. No. 4641.

Description; NE 1-4 Sec. 25, T. 37 N., R. 5 E., B. M.

UNITED STATES

to

PATENT

GEARY VAN ARTSDALEN.

Dated November 1, 1904.

Recorded Dec. 13, 1904, Book 55, p. 382, at re-
quest J. C. Jansen.

GEARY VAN ARTSDALEN, Single,

to

Warranty Deed.

CLEARWATER TIMBER CO.

(Corp. of St. Paul, Minn.).

Consideration, \$800.00.

Dated December 2, 1905.

Acknowledged December 13, 1905, before Fred
Judd, J. P., Nez Perce County, Idaho.Recorded Dec. 23, 1905, Book 81, p. 399, at re-
quest T. J. Davis, and delivered to T. J. Davis.Witnesses: Fred H. Judd and Mrs. Clarence
Judd.

UNITED STATES

vs.

LIS PENDENS.

WILLIAM F. KETTENBACH, et al.

Recorded Oct. 16, 1907, Book 1, p. 211.

The two Haevernick claims have been covered above, under the name of F. W. Kettenbach. Judge Dietrich finds there is no evidence of illegality of their entries (Vol. 1, p. 283).

The patent to Geary VanArtsdalen was dated November 1, 1904, and he conveyed direct to Clearwater Timber Company. It appears in his testimony that he had given an option to one Fitzgerald, and that this option was in some way taken over by Clearwater Timber Company and deed made direct to the company (Brown, Vol. 5, p. 1680 and VanArtsdalen Vol. 3, pp. 868-872). The testimony of Mr. E. N. Brown for Complainant (Vol. 5, pp. 1639-1683), as well as the testimony of F. J. Davies for Defendant (Vol. 10, pp. 3615-3625), shows the manner in which Clearwater Timber Company acquired properties was as follows: Mr. Brown (whose office for the company, and residence had been until about the middle of September, 1907, at Moscow, Latah County, Idaho, and whose office was thereafter, after having closed all purchases involved in this case, at Lewiston, Nez Perce County, Idaho), negotiated the purchase price with the vendors, and having done so required them to procure an abstract of title and execute a deed to the timber company and place the abstract and the deed in such bank as they might

choose at Lewiston. On advice to Mr. Brown that the deed and the abstract had been placed in the bank, he would go to the bank and draw a draft on Mr. Davies to pay the purchase price, and the deed and abstract, and draft would be sent forward by the bank to its correspondent bank in Spokane, where Mr. Davies resided, with the understanding that Mr. Davies was to have an opportunity to examine the abstract and deed, and if he found them satisfactory, he would pay the draft and forward the deed for recording and the abstract for continuation. Mr. Davies paid these drafts by giving a draft on the company in St. Paul, which he would hand to the bank in Spokane holding the deed and draft on him for collection. On receipt of draft on St. Paul, the Spokane bank would hand him the draft from Lewiston stamped "paid." The drafts referred to and correspondence with reference to each one of these sales were offered in evidence during the testimony of Mr. Davies and appear in Vol. 11, pps. 4194-4202 & 4156-4158. The evidence shows that Mr. Davies was not acquainted with the people in Lewiston, and he had only been here between trains, or something like that, once or twice. The evidence further shows that the President and Secretary, and Assistant Secretary of Clearwater Timber Company

resided in St. Paul, Minnesota, and they had nothing to do with these transactions, and had no knowledge of the people here, or the conditions here, and that none of them except the President had ever visited here, and he only once or twice, staying not longer than a few hours. No correspondence ordinarily passed between Mr. Brown and Mr. Davies in closing these deals, unless Mr. Davies should write Mr. Brown requesting him to call the vendor's attention to some defect in an instrument in the title. Nothing in connection with any of the purchases for consideration passed through other than Mr. Brown or Mr. Davies. Estimators preceded the purchase through the timber, estimating the timber, but they were estimating timber only, according to Government surveys, and did not know anything about titles or ownership and did not know what, if any part, of the land on which they turned in estimates would be bought or negotiated for. At the time of these purchases Mr. Brown did not know Geary VanArtsdalen, knew simply of such people as the Haevericks, had no acquaintance with Pearl Washburn, and purchased from the second grantee from her in the chain of title; and while he knew of Benton, he did not know the relations between W. F. Kettenbach and the Bentons, and did not know of two Ben-

tons. Reference has already been made to the William Haevernick property in connection with the Haevernick titles which passed first to F. W. Kettenbach, and later from him to Clearwater Timber Company. Neither Kester, W. F. Kettenbach, Robnett, Dwyer, nor any of them having any contact whatever with the transaction, or any interest in or knowledge thereof. Mr. F. W. Kettenbach, as shown above, had nothing to do with any of these timber transactions of Kester, W. F. Kettenbach, Robnett or Dwyer in any way whatsoever, and the connection of F. W. Kettenbach with a transaction would not carry any indication of any connection of W. F. Kettenbach, Kester, Dwyer, or Robnett therewith.

The Pearl Washburn claim was deeded by her first to McGrane, and then by McGrane to Chapman, and then by Chapman to Clearwater Timber Company. Judge Dietrich finds little if any evidence of illegality of this entry (Vol. 1, p. 296). Certainly there is nothing in the chain of title, or in the circumstances that would lead the purchaser from Chapman, whose title came from McGrane, to believe that there was anything wrong with the title. Mr. Brown testified that he was never aware of the chain of title, did not look at or examine the abstract in any manner whatsoever, so nothing that might have appeared in the

chain of these titles is shown to have come to his attention. He testified that it did not come to his attention. Mr. Davies, who examined the titles in Spokane, Washington, had so little knowledge of things in this vicinity that nothing that he may have seen in any of these abstracts would have been sufficient to have put him upon inquiry.

The two Benton claims passed first by conveyance to C. W. Robnett in 1902. Robnett then mortgaged them for \$3,000.00 to O. E. Guernsey, who was then making mortgage loans in this vicinity. After that Robnett conveyed to Elizabeth White, the deeds to her being recorded July 8, 1907. There is nothing to show that Guernsey was not an innocent purchaser as mortgagee, the payment in advance of value raising the presumption of bona fides. There is nothing to show to a stranger examining the title that Elizabeth White was not a bona fide purchaser, and thereafter by deed dated September 4, and recorded September 18, 1907, she conveyed to Clearwater Timber Company. The Government makes prominent in the examination of Mr. Brown the fact that William F. Kettenbach represented Elizabeth White in the sale of these claims to the timber company. Her husband was dead, William F. Kettenbach was her son-in-law, and it appears in this testimony he looked

after this and other business for her generally. Mr. Brown testifies that he understood during the negotiation that the property was being bought from Elizabeth White, that W. F. Kettenbach was acting for her, and that the deed the bank forwarded was a deed from her. Mr. Brown was, just about that time, moving from Moscow to Lewiston. We feel confident that there was nothing about those circumstances that should have put Mr. Brown upon inquiry, or made him suspicious. He testified that he had no knowledge of illegality, and no notice of any illegality inherent in any of these claims at the times of his purchasing. There is no testimony to contradict this. Patents had been issued a long time; the Government had not begun suit to set aside the patents; the company was not purchasing of any entryman, and no one other than Mr. Davies had knowledge on the part of the company of the chain of title or the names of the entrymen where purchases were not made from the entrymen direct. The \$3,000.00 mortgage on the two Benton claims was released simultaneously with the closing of the same to the Clearwater Company. In the Court below the Government stated Clearwater Timber Company had refused to purchase the Benton claims unless title should come through some one else than Robnett.

also that "defendants" had knowledge of the arrangements between Robnett and the entrymen. There is no such evidence. (Dietrich, Judge, Vol. 1, p. 317.) The evidence concerning the Timber Company's acquisition of these titles is, Brown for Complainant (Vol. 5, pp. 1639-1683), Davies for Defendant (Vol. 10, pp. 3615-3625), VanArtsdalen (Vol. 3, pp. 868-872). Judge Dietrich disposed of the W. B. Benton claim (Vol. 1, pp. 290-293) and Joel H. Benton claim (Vol. 1, pp. 316-318.

It seems to counsel for this defendant that there are two circumstances in the record which may have misled counsel for the Government into making the statement that Clearwater Timber Company is chargeable with notice. In the direct examination of Mr. Brown by the Government, he testified to having seen at one time, either in the newspaper or otherwise, some notice of a charge having been brought by the Government against the validity of these titles. On cross-examination it appeared that this matter was the *Lis Pendens* of the commencement of one of these suits. This being the case, we know that the *Lis Pendens* was after the completion of the purchase of these titles, and therefore the notice was not effective. The company had become a bona fide purchaser before that. On cross-examination, Mr. Brown with reference to this was asked:

"Q. I will ask you to state whether that was before or after the company had acquired these titles and paid the purchase money.

A. That was after we had acquired the land."

(Vol. 5, p. 1680, bottom of page.)

Another circumstance which may have misled counsel for the Government, and it appears from his brief to mislead him, into the belief that Clearwater Timber Company was chargeable with notice, are the circumstances surrounding the claim of one Soren Hanson. A deed from Soren Hanson to Clearwater Timber Company went of record; it appears clearly from the testimony of Soren Hanson (Vol. 2, pp. 512-527) and W. F. Kettenbach (Vol. 5, pp. 1689-1694) and E. N. Brown (Vol. 5, pp. 1639-1643 and 1663-1670) that the Clearwater Timber Company had nothing to do with the execution and placing of record of this deed; that it was delivered by Hanson, and placed of record by Kettenbach without the knowledge of Clearwater Timber Company, and without their consent; that they had not bought the land, never paid anything for it, and have always disclaimed any interest in the land, and have not paid the taxes on it; and are willing that the owner of it, whoever the owner is, should have it. Mr. W. F. Kettenbach applied to the Clearwater Timber Company for quit claim deed to him for this

land, which was placed in its name under the circumstances aforesaid. The company's officials in St. Paul executed a quit claim, and mailed it to their attorney, the present attorney for the defendant in this case, with instructions that he should inquire into the circumstances and see whether it was proper to deliver the deed to Kettenbach. The attorney was still holding the deed for information at the time Soren Hanson testified in this case, and when Mr. Brown testified shortly thereafter, the attorney produced the deed for information of the court in this case, and let it be read in the record, also the letter of instructions which he received, and made the statement he still had the deed under advisement and he had come to the conclusion from the testimony heard in the case that it should not be delivered to Mr. Kettenbach. This statement was made during the testimony of Mr. Brown, not for the reason that the attorney had passed upon the title as between Mr. Kettenbach and Mr. Hanson, but for the reason that there was sufficient controversy and uncertainty about the matter, the company never having taken any action in the matter, should not do so, and should leave it for the parties in interest, whoever they are, to settle it either between them-

selves or by some adjudication in which all parties are brought in.

It appears that Mr. Kettenbach or Mr. Hanson, or both of them, attempted to sell this claim to the Clearwater Timber Company through Mr. Brown, and that Mr. Brown was advised by Mr. Kettenbach or otherwise, that the Government had already begun a suit to set the patent aside, and that a Lis Pendens had been filed. Mr. Kettenbach seemed to think the title was sufficiently good that it could be bought by the company without regard to the suit and the Lis Pendens. It seems Mr. Kettenbach was putting up to Mr. Brown at the same time some other titles on which suit and Lis Pendens was pending. Mr. Brown having asked the attorney whether the company could purchase the title on which were pending suit and Lis Pendens and being advised in the negative, turned them down.

The Governments brief at page 56 states there was an "arrangement" to sell the Hanson claim to the Clearwater Timber Company. There is no such evidence.

The fact that suit was pending and Lis Pendens pending against this claim at the time it was brought to Mr. Brown's attention shows that it was not brought to his attention until after the purchase of

all the claims which the Clearwater Timber Company has acquired in this case had been closed; so that whatever notice Mr. Brown had got in connection with this Soren Hanson and other claims, that the Government was litigating, it was long after the date of purchase of title to these claims, all of which it had previously acquired. The Government also points to the fact that in the Spring or Summer of 1907 Mr. Brown testified for the Government as a witness at Moscow in the trial for conspiracy, of the land conspiracy case in the United States District Court against W. F. Kettenbach, George H. Kester, and others. Mr. Brown's testimony shows that in that connection he was brought right in as a witness from the woods and put upon the stand, and identified a map of a timber fire protective association which showed boundaries but did not show any individual ownership, and after having identified the map he was taken from the stand and returned immediately to the woods. The only conspiracy indictments pending were Nos. 637, 635, 605, 617, 618 and 615, none of which mention any of the entries which were acquired by Clearwater Timber Company, nor were any of these entrymen's names endorsed on these indictments as witnesses when they were returned. From the examination of Mr. Brown made

in that case, nothing in connection with his testifying in that case would bring to his attention anything disclosed in the indictments, or anything concerning the issues in the case. Of course Mr. Brown does not know whether the case he was testifying in was a conspiracy case or not. The counsel for the Government so intimated in his examination of Mr. Brown. The titles he acquired after that date were the Haevernick titles, bought from F. W. Kettenbach, which were not referred to in any way in any of the criminal cases; the Pearl Washburn title, which passed to McGrane, from McGrane to Chapman, and from Chapman by deed dated June 7, 1907, which may have been prior to the time Mr. Brown testified; and the title which he purchased from Elizabeth White in September, 1907. Her name had not in any way figured in any of the criminal trials, and Mr. Brown did not know from whom her title was derived, or if he had known these titles were not mentioned in the conspiracy indictment, nor were the names of these entrymen endorsed as witnesses on the conspiracy indictments returned. As we shall find hereafter on reference to the authorities, it is not necessary for one, to establish his bona fides in purchasing property, to presume fraud, or to be suspicious, or to surmise things. He is only required to

know fraud when he sees it plainly enough to establish it to the mind of a person of ordinary intelligence who is not looking for fraud, and presumes as every one has a right to presume that transactions are bona fide until the contrary is brought to his knowledge. The purchaser who does not purchase in good faith purchases with knowledge, and with a guilty conscience, and mala fide—otherwise than in the ordinary course of business. In the ordinary course of business people presume no fraud unless it is brought to their attention. This great record of testimony and documents in this case clearly shows that Clearwater Timber Company has not been in any sense whatsoever a participant in the slightest degree in any unlawful conduct in the acquisition of timber lands and could not have acquired its vast acreage by dishonest principles or methods, for fraud is necessarily hidden and secret, and must be confined to smaller transactions and dealings.

V.

IDAHO TRUST COMPANY, AND LEWISTON
NATIONAL BANK.

Lewiston National Bank acquired title to the claims of Van D. Robertson, September 29, 1904, Drury N. Gammon, October 9, 1903, and Robert O. Waldman, October 25, 1907.

These were acquired in payment of prior existing indebtedness to the bank. The Robertson and Gammon claims were acquired long prior to the time F. W. Kettenbach became president, and Edward C. Smith became cashier of the bank, succeeding W. F. Kettenbach and George H. Kester, who theretofore had been president and cashier. On the acquisition of the Robertson and Gammon claims in 1904, the bank was necessarily chargeable with notice of any knowledge which any of the officials in the bank participating in the transactions had where such officials had no private interests of their own, and were acting in the interests of the bank only. Robnett conveyed the Gammon claim to the bank, and of course the bank could not be chargeable with any knowledge which he had for the reason he was the other party to the transaction, and was not representing the bank in the transaction. If these claims should have to stand or fall, so far as the bank is

concerned, upon the issues between the Government and the entrymen, which has already been discussed in Mr. Tannahill's brief, counsel assumes that the claims will have to be held valid, because the entrymen undoubtedly testified as substantially, if not quite all of the entrymen, that there was no prior agreement, express or implied, for the sale of the claims. This testimony was also corroborated by W.F. Kettenbach, and George H. Kester: such being the case it is immaterial what Robnett may have testified, even if he were in no way impeached in the record, because the entryman's statement is just as good as his, and added to that is the testimony of Kester and Kettenbach. A record in such a condition under the rule of evidence requiring a case to be made made out clearly and satisfactory beyond a reasonable doubt, it is respectfully submitted there is no possibility for complainant to secure a decision in its favor. Judge Dietrich finds no evidence sufficient to justify cancellation of the Robertson patent (Vol. 1, pp. 302-303) and the bank's title to the Gammon claim (Vol. 1, pp. 304-305).

The other claim to which the bank secured absolute title, is the claim of Robert O. Waldman, deed for which was secured October 25th, and recorded October 26, 1907. The Government's first complaint

to set aside patents was filed October 14, 1907, and *Lis Pendens* immediately after, and this suit and *Lis Pendens* did not include the Waldman claim. It stood therefore entirely clear of record. The Government had filed its suit, attacking a very large number of entries, and it omitted this and many others, which was to all intents and purposes a clearance of all claims not included in the suit. Certainly the general public dealing in lands would have a right so to consider. The suit which was filed October 14 had been filed after very great delay, and would give, and did give, the impression that it was the deliberate and complete and final action of the Government in the premises. The Waldman claim was not attacked by the Government until after September, 1909, on which date No. 406 was begun, and by amendment subsequently the Waldman claim was inserted. Meanwhile the Lewiston National Bank, relying upon the Government patent so long of record unquestioned, and still unquestioned after more than two years from the returning of the first indictment in connection with these frauds, unquestioned in the first civil suit filed, attacking fifty-four entries in connection with these frauds, the title to the Waldman claims was taken over for the bank by F. W. Kettenbach, the new president, who, as it ap-

pears in the earlier portion of this brief, had nothing to do with any of these land transactions. Judge Dietrich having invalidated the bank's claim to this entry, the amount involved was too small to justify an appeal. (Vol. 1, pp. 288-290).

In addition to the foregoing claims to which the said bank took absolute title an absolute deed was made by William F. Kettenbach and George H. Kester to the Idaho Trust Company July 6, 1907, the same being made, however, only for the purpose of securing indebtedness to the Idaho Trust Company and Lewiston National Bank, then or theretofore existing, or which might thereafter be incurred, and on the 23rd day of July, an instrument was executed reciting that the execution of the said absolute deed had been made for the purpose of securing the indebtedness as aforesaid only. (Vol. 5, pp. 1927-1932). The indebtedness secured by said deed and instrument accompanying same with accumulations to the filing of the answer, viz: December 6, 1909, are as follows:

LEWISTON NATIONAL BANK

A. Indebtedness of George H. Kester.

- (1) \$20,000.00 and interest existing at the date of said deed.
- (2) \$8,000.00 and interest existing at said

date, the liability therefor being as guarantor of indebtedness of Naylor and Norlin.

B. Indebtedness of William F. Kettenbach.

- (1) \$2,000.00, with interest from December 20, 1908.
- (2) \$10,000.00, with interest from March 9, 1909.

IDAHO TRUST COMPANY.

A. Indebtedness of George H. Kester.

- (1) \$10,511.87, with interest from September 30, 1909.
\$20,000.00 advanced to George H. Kester at \$0,000.00 advanced to George H. Kester at the time of the execution by himself and Kettenbach to Idaho Trust Company of said absolute deed and instrument declaring that same was made to secure the payment of money only. (Vol. 9, pp. 3547).
- (3) \$5,000.00, with interest on account of a loan that had been made to George H. Kester upon the execution of said absolute deed.

B. Indebtedness of William F. Kettenbach.

- (1) \$4579.00, with interest from October 13, 1909.
- (2) \$7,929.00, with interest from May 13, 1909.

Since the filing of said answer, the notes held at the time of the filing thereof had been renewed and extended from time to time, and possibly other indebtedness incurred by the said Kester and William F. Kettenbach, all of which is secured by said ab-

solute deed and instrument accompanying same, all of which, together with the indebtedness of said William F. Kettenbach and George H. Kester to said bank and trust company as above set forth at all different dates from and including the dates of the deed and trust instrument, is shown in the testimony of F. W. Kettenbach, (Vol. 9, pp. 3545 to Vol. 10, pp. 3659 and 3683). The same matter is also covered in the testimony of Edward C. Smith, secretary of the Idaho Trust Company, and cashier of the Lewiston National Bank, (Vol. 5, pp. 1889, 1948, Vol. 6, pp. 2016-2039), and the testimony of William F. Kettenbach and George H. Kester and William Dwyer. (Exhibits touching same touching notes and lists of renewals Vol. 11, pp. 4184-4192).

The said absolute deed and instrument accompanying same was taken by F. W. Kettenbach after he became president of the Lewiston National Bank, while George H. Kester and William F. Kettenbach were not representing the bank, and were representing themselves only, and were adversary parties to the bank in the transaction. The knowledge of William F. Kettenbach and George H. Kester at that time would not be chargeable to the bank. The first suit had not been begun to set aside patents for any of the property included in the deed, and the long

time expiring since the first indictments returned by the Government, gave color to the fact that the Government had practically abandoned its prosecutions and certainly that it was not hoping to recover the land. F. W. Kettenbach testified that from the investigations that he had made touching the matter, he did not believe that the entries were fraudulent; that any of the criminal prosecutions would succeed or that the Government would be able to set aside any of the patents.

In addition to the indebtedness of Kester and William F. Kettenbach as above set forth, the said bank, and trust company, also held the indebtedness of Kittie E. Dwyer, and William E. Dwyer, her husband, secured by absolute deed dated December 31, 1908, made to Idaho Trust Company, and an instrument setting forth that said deed was held to secure indebtedness then and theretofore existing to Kittie E. Dwyer and William Dwyer, her husband, and thereafter to be incurred by either of them to either said bank or said trust company. (Vol. 5, pp. 1935-1941). The indebtedness of said Kittie E. Dwyer and husband with accumulations to December 6, 1909, was as follows:

INDEBTEDNESS OF KITTIE DWYER AND HUSBAND TO LEWISTON NATIONAL BANK

- (1) Note dated December 31, 1908, \$14,056.00, and interest, the larger portion of this indebtedness existing since the 8th of July, 1907, on which date Kittie E. Dwyer and her husband executed a mortgage to said bank, to secure notes to the bank aggregating \$12,500.00 which sum, with interest, is included in the above mentioned \$14,056.00. (Vol. 9, pp. 3562-3567). This note for \$14,056.00, was assigned to Idaho Trust Company and is referred to below under indebtedness to Idaho Trust Company.

Indebtedness of Kittie E. Dwyer, and William Dwyer, her husband, to Idaho Trust Company.

- (1) Idaho Trust Company having taken assignment of note to Lewiston National Bank for \$14,056.00 on October 13, 1909, said Kittie E. Dwyer and husband executed to Idaho Trust Company their note for \$15,000.00 and interest, which included the amount due on said note for \$14,056.00.

- (1) On the same day Kittie E. Dwyer and husband executed another note for \$3,450.00 and interest, representing a loan to them by said trust company.

Of this indebtedness of Kittie E. Dwyer and husband, \$12,100.00 was secured on this land by mortgage recorded July 10, 1907, (Vol. 9, pp. 3562). This was renewed and extended and is now part of the debt secured by their absolute deed and trust agree-

ment to Idaho Trust Company. (Vol. 9, pp. 3564-3567). So the lien for that much and interest precedes the *lis pendens*.

This indebtedness of Kittie E. Dwyer and husband has been renewed from time to time, and possibly increased, all of which is shown by the testimony of F. W. Kettenbach, (Vol. 9, pp. 3545 and Vol. 10, pp. 3659-3683), above referred to.

VI.

AUTHORITIES ON THE SUBJECT OF BONA FIDE PURCHASE FOR VALUE WITHOUT NOTICE.

In *United States v. Detroit Timber and Lumber Company*, 26 Supreme Court Reporter 282; 200 U. S. 321; 50 Law Edition 499, Judge Brewer delivering the opinion of the Court said:

"We do not understand the law to be as stated or that one who enters into an ordinary and reasonable contract for the purchase of property from another is bound to presume that the vendor is a wrong doer and that therefore he must make a searching inquiry as to the validity of the property. The rule of law in respect to purchases of land or timber is the same as that which obtains in other commercial transactions. . . . No one is bound to assume that the parties with whom he deals is a wrong-doer, and if he presents property the title to which is apparently valid and there are no circumstances disclosed which cast suspicion upon the title he may rightfully deal with him. . . . *Jones v. Simpson*, 116 U. S. 609, 615; 29 Law Edition 742-744; 6 Sup. Ct. Rep. 538. *He is not bound to make a searching examination of all the account books of the vendor, nor hunt for something to cast suspicion upon the integrity of the title. . . .* As said by Strong, J., in *Meehan v. Williams*, 48 Pa. 238. What makes inquiry a duty is *such a visible state of things* as is inconsistent with a perfect right in him who proposes to sell."

In *Sulthis v. McDougal et al.* 170 Federal, 529, the Court of Appeals of the 8th Circuit, speaking unanimously through Amidon, District Judge, said:

"On the contrary, they took the very steps which would have been taken by a prudent business man to ascertain the state of the title. Instead of consummating the purchase, they suspended the transaction, and ordered an abstract. They had good reason to believe, that, if there was any outstanding instrument affecting the title to the property, the records would disclose the fact. The abstract showed the title to be clear. This was strong confirmation of what Berryhill had told them that the papers which he had executed were 'no good,' and were so regarded by the parties to whom they had been given. Upon this showing we are of the opinion that the McKays acted in good faith in accepting the deed and paying the purchase price. They exhausted the sources of information that had been disclosed to them, and what they discovered was such as would have led a man of reasonable prudence to believe that the title to the property was clear. 2 Pomeroy's Equity Jurisprudence, pp. 1008, note 1. The mere knowledge that papers had been previously executed which might affect the title to real property will not necessarily defeat the claim of a good-faith purchaser. In *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960, the purchaser employed a counsel to examine the title. In the course of his investigation he learned as a fact that the land had been previously sold, but there being no conveyance of record, and the transaction being an old one, he reached the conclusion that the title of the

vendor was good, and so reported to his principal. The Supreme Court, though holding that the principal was charged with all the knowledge possessed by his agent, still decided that the vendee was entitled to the protection of a good-faith purchaser. Speaking to this question, it said:

'In order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must either have knowledge of the conveyance, or at least of such circumstances as would by the exercise of ordinary diligence and judgment lead to that knowledge; and vague rumor or *suspicion*, is not a sufficient foundation upon which to charge a purchaser with knowledge of a title in a third person. Notice of a sale does not imply knowledge of an outstanding and unrecorded conveyance'

In the case of *United States v. Detroit Lumber Co.* 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499, the suspicious circumstances were much stronger than in the present case, but the Supreme Court refused to charge the purchaser with notice, using the following language:

'A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors, pp. 622, where he says: 'In *Ware v. Lord Egmont*, 4 De Gex, M. & C. 460, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice,

unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence.'

See, also, the same case in this court, 131 Fed. 668, 674, 67 C. C. A. 1.

The position of the assignees of the McKays, however, is more favorable than their own. The evidence shows affirmatively that in October, 1906, the McKays executed an oil and gas lease of the property to Arthur B. Reese, under whom the other defendants claim. The rule is well settled that if Reese took without notice of plaintiff's lease, his title would be good though his vendor had such notice. *Stanley v. Schwalby*, 162 U. S. 255-283, 16 Sup. Ct. 754, 40 L. Ed. 960. At the time Reese accepted his lease, he inquired of the McKays whether there was any outstanding claim against the property, and was told by them there was not The evidence is clear that neither Reese nor his agent at the time he took his lease had any actual knowledge of what appeared upon those records. Inasmuch as he was under no legal duty to search at the agency, his ineffectual effort to ascertain the state of its files certainly cannot place him in the same position as he would have occupied if he had obtained actual knowledge of the lease.

From a careful examination of the evidence we are of the opinion that the defendants are entitled to the protection of good-faith purchasers as against complainant's lease. The decree, therefore, of the trial court was right, and it is affirmed."

The doctrine of bona fide purchaser for value without notice is only applicable at common law, to negotiable instruments, real property and sales in market. In the commerce of negotiable paper, the question of notice and duty of inquiry and bona fides have been more fully discussed by the courts, and illustrated than elsewhere. In *Heard v. Dubuque County Bank*, 8 Nebr. 10; 30 Am. Rep. 813, the Court said:

"In *Magee v. Badger*, 34 N. Y. 247, Porter, J., says: 'The purchaser is not bound at his peril to be upon the alert for circumstances which might probably excite the suspicions of wary vigilance. He does not owe the party who puts negotiable paper afloat the debt of active inquiry to avert the imputation of bad faith.'"

Defenses to Commercial Paper, Joyce, page 596.

"Sec. 475. Notice of Knowledge—Suspicious circumstances—Gross negligence—Bad faith. Merely suspicious circumstances or carelessness are insufficient to necessitate inquiry and prevent a person from being a bona fide holder, nor is mere suspicion evidence of negligence which will defeat a right to

receiver as a bona fide holder. So under a California decision such suspicion is insufficient without circumstances creating a presumption that facts impeaching the validity of the paper were known by the holder. And in Connecticut it is held that the holder of negotiable paper is not put upon inquiry by knowledge of facts which, although capable of supporting a suspicion of some unknown defect, are fully consistent with a valid title in the vendor. So under other decisions the acts of the holder in failing to make inquiry must have amounted to bad faith to preclude recovery. And even gross negligence without bad faith is insufficient. But if the acts of the holder in obtaining the paper constitute bad faith he will not be entitled to protection as a bona fide holder. *It may therefore be stated as a rule that suspicious circumstances alone, even though sufficient to put an ordinarily prudent man on inquiry will not, in the absence of bad faith, or a wilful disregard of the facts showing an infirmity in the paper, destroy the title of a taker of negotiable paper as that of a bona fide holder.*

476. Same subject—Decisions.—In a case in the United States Supreme Court, where an accepted and indorsed bill of exchange was placed by the drawer as collateral security for his own debt in the

hands of his creditor, and the latter sued the acceptor, an instruction was held erroneous, "that if such facts and circumstances were known to the plaintiff as caused him to suspect or that would have caused one of ordinary prudence to suspect, that the drawer had no interest in the bill, and no authority to use same for his own benefit, and by ordinary diligence he could have ascertained these facts," then the jury should find for the defendant.

41 Goodman v. Simonds, 20 How. (61 U. S.) 343, 15 L. Ed. 934. . . Lytle v. Lansing, 147 U. S. 59, 71, 37 L. Ed. 78. . . King v. Doane, 139 U. S. 166, 173, 35 L. Ed. 84, 11 Sup. Ct. 465. Montclair v. Ramsdell, 107 U. S. 147, 158, 27 L. Ed. 431, 2 Sup. Ct. 391. . . . Swift v. Smith, 102 U. S. 442, 444, 26 L. Ed. 193 (to the point that where mercantile paper is not due and there is nothing upon it or in the indorsement to show want of good faith the purchaser of such paper from one apparently the owner, who gives consideration, *obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts.* "He can lose his

right only by actual knowledge or bad faith.. It is true that if the bill or note be so marked on its face as to show that it belongs to some other person than the one who offers to negotiate it, the purchaser will be presumed to have knowledge of the true owner and his purchase will not be bona fide."); *Brooklyn City & Newton R. Co. v. National Bank of the Republic*, 102 U. S. 14, 38, 41, 26 L. Ed. 61. In concurring opinion:

"Possession of such an instrument before maturity, if indorsed in blank and payable to bearer, is prima facie evidence that the holder is the owner and lawful possessor of the same; and nothing short of proof that he had knowledge, at the time he took it, of the facts which impeach the title as between antecedent parties, not even gross negligence if unattended with mala fides, is sufficient to overcome the effect of that evidence, or to invalidate the title of the holder supported by that presumption." . . . *Perris Irrigation District v. Thompson*, 116 Fed. 832, 834, 54 C. C. A. 336, 341, in error, dismissed for want of jurisdiction, 196 U. S. 637 (bona fide holder of bonds of Irrigation district; cited to point. "*It was not enough that the circumstances might have been such as to create suspicion in the mind of one ordinarily prudent.. In order to render the trans-*

action invalid, facts must have come to the notice of the defendant in error or his agent of such a nature that to refrain from pursuing further inquiry would of itself amount to evidence of *bad faith*.”) . . . (476 continued.) So in New York it is declared in a recent case that mere surmise or suspicion is no longer sufficient to put a purchaser of negotiable upon inquiry; the facts necessary to cause such inquiry must be such as to show *dishonesty or bad faith* on his part in refraining from making the inquiry, and that this rule applies to negotiable bonds and coupons held by one who derived his title through a holder in due course, who is an innocent purchaser for value not affected as a party to any fraud or illegality in the paper. *Hibbs vs. Brown*, 98 N. Y. Supp. 353. And in another case in that state the rule that suspicion of defect of title, or the knowledge of circumstances such as would excite suspicion in the mind of a prudent man or gross negligence on the part of a taker at the time of the transfer, will not defeat his title, as such a result can only be produced by bad faith on his part, and that the question is one of honesty or dishonesty and that guilty knowledge and wilful ignorance involve the result of bad faith, and fraud established is fatal to the title, applies to negotiable securities,

and this is declared to be settled law in New York.

48 Perth Amboy Mut. Loan H. & B. Assn v. Chapman, 81 N. Y. Supp. 38, 80 App. Div. 556, aff'd (mem.) 178 N. Y. 558, 70 N. E. 1108.

A.

There are certain features of this case of special interest and significance in connection with the relation between the Government and third persons who have acquired interests in these lands through and under the entrymen. After the tedious formality, notices to the public, and hearings, the Government issued its final certificate, based on testimony taken after notice given, certifying that entrymen had a right to patent, and later issued the patent, one of the most solemn acts done by the Government in the administration of its affairs. The Government's right to cancel a final certificate as against a bona fide purchaser prior to patent, was challenged by one of the ablest opinions written by any of the attorneys general of the United States—that of Caleb Cushing, Atty. Gen. 7 Opinion, 657. This able opinion has not been followed in the Land Department—though it would have been more to the credit of the Government perhaps if it had been, and the

influence of the Government's example would have been beneficial in the education of the people, and would doubtless have caused them to be more insistent on punishment in criminal courts whenever fraud was committed upon the Government. The principles of that opinion always were and still are dominant in the courts in those matters.

We are now dealing, however, not with a final certificate, but with a patent which the Government sent forth with all solemnity and credit possible to be attached to any document, intending that the public should rely upon it. It is akin commercially to the confidence which is attached, or which should be attached to commercial paper, and it is known that it circulates as freely and as speedily as long as it is outstanding. It is not the purpose to contend here against the right of the Government to set aside a patent for fraud in the hands of anyone who has acquired the title with guilty knowledge. The only contention here urged is that the Government be held to the same rules of action when it seeks relief from fraud which is required from a private individual whenever it is sought to interfere with the rights of third parties who have acquired an interest in the property without knowledge of the

fraud. In *United States v. Detroit Lumber Company*, *supra*, the Court says:

“Any person who deals with such entrymen, —relying upon the evidence of his entry, which are in all respects in good form and sufficient, and are an acknowledgement by Government officials of a rightful entry—*is justly entitled to the consideration of a court of equity*, much more so where it is a patentee.”

As declared in that case, the Government stands in a court of equity subject to the rules and obligations of equity in good conscience the same as an individual. This doctrine has been declared in a number of Federal cases, as follows:

In the *United States v. Stinson*, 25 Sup. Ct. Rep. pp. 426, the Court, speaking unanimously through Brewer, Justice, said:

“The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual.”

The case last mentioned affirmed the opinion in the same case in the Court of Appeals which was delivered by Grosscup, Judge, and in which, at 125 Fed. 910, he said:

“When the Government seeks its rights at the hands of a court, equity requires that the rights of others as well, should be protected. *Parr v. United States*, 98 U. S. 438; 25 L. Ed. 209 . . .

The substantial considerations underlying the doctrine of estoppel apply to Government as well as to individuals. *Chope v. Detroit Plank Road Co.*, 47 Mich. 195; 26 Am. Rep. 512. *Commonwealth v. Andre*, 3 Pick., 224."

In *Walker v. United States*, 139 Fed., 409, Jones, Judge, delivering the opinion of the Court, said:

"While underlying principle of all the decisions is that when the sovereign comes into court—the Court has authority and is under duty to withhold relief from the sovereign except upon terms which do justice to the citizen or subject as determined by the jurisprudence of the forum in like subject-matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States . . . may in a particular case work an estoppel against the Government."

Citing: *Lindsay v. Hawes*, 2 Black, 560; 17 L. Ed., 265.

U. S. v. Bank of Metropolis, 15 Pet. 392; 10 L. Ed. 774.

Davis v. Gray, 16 Wall, 203; 2 L. Ed., 447.

Sinking Fund cases, 99 U. S., 719; 25 L. Ed. 496.

U. S. v. Parker, 12 Wheat, 559; 6 L. Ed. 728.

Cooks v. U. S., 91 U. S., 398; 23 L. Ed. 237.

Duvall v. U. S., 27 Ct. Cl., 60.

Hartson v. U. S., Ct. Cl., 456.

"The principle that the sovereign is bound by his own acts . . . is a wholesome one and requires the Courts to visit an estoppel upon the

sovereign in a particular case where he invokes judicial action."

If a private individual issue a certificate of corporate stock, a warehouse receipt, or a bill of lading, bearing his endorsement in blank, and places it in the hands of his agent with instructions which are disregarded by the agent, the individual cannot question the title which may be secured by any innocent purchaser dealing with the agent. This is true not because the document was negotiable, but on the grounds of estoppel, on the principle that one who has placed it in the hands of a third person to injure another shall make good the injury which has been done. Has not the United States, by leaving these patents stand of record for years after the time they saw fit to indict parties criminally in connection with the alleged frauds, been as guilty of holding out to the public muniments of title in respect of which they might deal as the party who sends forward his agent with bill of lading, warehouse receipt, and certificates of stock endorsed in blank?

If a private individual, having knowledge enough to swear out a warrant for criminal arrest in connection with fraudulent acquisition of property should nevertheless leave the title to the property standing upon the public records from two to three

years, or more years thereafter without any lis pendens, would not he in a court of equity be charged with laches which would prevent him from attacking the title of any person who may have acquired an interest therein free from guilt? Would it lie in the mouth of a person allowing the title to stand open of record in that way to charge persons acquiring an interest therein with negligence? Has not the very issuance of such muniments of title *authorizing* ~~and to deed~~ in such lands with a confidence which invited and induced the public to extend confidence ~~silence~~ *my* precautions of every kind.

I have no doubt that between private individuals, a Court of Equity would promptly dismiss a complainant standing in such a position. If there had been circumstances sufficient in this case to create the duty to make inquiry on the part of the bank and trust company, what inquiry could have been made, and what would have been the result of the same? If they had sought out the entrymen they would have told them as they have testified, that they had no prior agreement to sell their claims, and that their entries were made bona fide for their own use. Receiving this information they would have been justified in going ahead and taking the mortgages which they took. The verdict of acquittal in

the criminal cases affirmed this. Had they made the inquiry, they could have had no knowledge of illegality; the information they would have secured would have negatived such. Concerning such a situation in 23 American and English Encyclopedia of Law, second edition, page 514, it is said:

“(8) Discharge of Duty to Make Inquiry—

(a) **FAILURE TO DISCOVER ADVERSE RIGHTS.**—Where a purchaser, having been put upon inquiry, exercises due diligence by following the line of inquiry suggested, and either fails to discover the existence of any adverse rights, or becomes satisfied that his suspicions were unwarranted, or that some change in the circumstances had obviated the grounds of his apprehension, he will not be chargeable with notice. Thus, where a purchaser having information that a person other than the vendor is in possession of the land, exercises due diligence in investigating the nature of the occupant's possession, and fails to gain knowledge of the possessor's rights, the notice afforded by the possession cannot be asserted against him. Likewise, where a purchaser is put upon inquiry by the circumstances that a tenant is in possession of the land, and after making due inquiry fails to discover the fact and circumstances of the tenancy, he will not be chargeable with notice of the landlord's title.”

F. W. Kettenbach testified practically to having made the inquiry and received information in favor of the validity of claims on which he must rely, as declared in the authority just quoted. The verdict

of acquittal in the criminal case corroborates his report of the result of the inquiries he made and Judge Dietrich's decision adds to the corroboration, in fact, confirms the position taken by F. W. Kettenbach in his testimony. Smith vol. 6 pp. 3025-2026 and Kettenbach Vol. 10, 3602-3603.

There were no circumstances brought to the notice of Mr. Brown, or Mr. Davies, pertaining to the titles they were acquiring for Clearwater Timber Company, which would arouse any question in their minds with reference to the titles, much less create even any suspicions, and they come clearly within the doctrine in the case of *United States v. Detroit Lumber Company*, that where there is nothing to excite question and inquiry, it is not necessary for them to hesitate for the purpose of conjuring up hypothetical questions of illegality to be investigated.

With substantially all the claims valid as found by Judge Dietrich, how can it be said that a purchaser was negligent even, to say nothing of showing want of good faith, where he used caution and discrimination as F. W. Kettenbach testifies he did, in taking titles for the Bank and Trust Company for security only. Of the fourteen claims transferred to the Idaho Trust Company as security,

Judge Dietrich found only one, viz: that of Guy L. Wilson, illegal, and that the Trust Company was put upon inquiry, because, it was one of the claims involved in an indictment that had been tried, and the officers of the Trust company were so closely connected with parties involved in the case that it would be presumed they knew enough to be put upon inquiry. The value of the claim was not enough to justify an appeal by the company. A presumption, is a dangerous thing. It consists in "taking" a thing for granted without any proof of ~~therefore its~~ right to the grant.

It does not seem that, when only one claim out of fifteen, is bad, people should be precluded from purchasing any of the fifteen because of rumors of illegality, and certainly in such a case the Government should act quickly in asserting its right; more quickly, and with less misleading vacillation than it has done in this case.

Simply because there have been general vague public rumors of illegality so groundless as to be without basis about fifteen times to each single instance of verity, does not result in reducing the question of bona fide purchase, to a question whether there was illegality in fact since the question of bona fide purchase concedes the illegal-

ity and depends upon the bona fides of the purchaser. The fact that he was negligent, does not defeat his title nor does anything but *mala fides*. Where a court below holds that there was no illegality in a title, a court above reverses the holding, there is so little foundation for the contention, that the good faith of the purchaser, in believing the title good, should not be any more subject to question than the good faith of the judge below in so deciding. The law gives a Lis Pendens, for protection of one claiming to have been defrauded and in case of alleged fraud a party is required to act at once on discovery of the fraud.

VII.

A purchase under a quit claim deed is not deprived of status of a bona fide purchaser.

Moelle vs. Sherwood, 148 U. S. 21; 37 L. ed. 350; 13 Sup. Ct. Rep. 426;

where the court said:

"The doctrine expressed in many cases, that the grantee in a quitclaim deed cannot be treated as a bona fide purchaser does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument,—that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time,—indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property; and therefore it is said that the grantee, in accepting a conveyance of that kind, cannot be a bona fide purchaser, and entitled to protection as such, and that he is in fact thus notified by his grantor that there may be some defect in his title, and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty of the soundness of its title, or its freedom from the claims of others, or to execute a conveyance in such form as to imply a warranty of any kind, even when the title is known to be perfect. He may hold the property only as a trustee, or in a corporate or official character, and be unwilling, for that reason, to assume any personal responsibility as to its title

or freedom from liens, or he may be unwilling to do so from notions peculiar to himself; and the purchaser may be unable to secure a conveyance of the property desired in any other form than one of quitclaim, or of a simple transfer of the grantor's interest. It would be unreasonable to hold that, for his inability to secure any other form of conveyance, he should be denied the position and character of a bona fide purchaser, however free, in fact, his conduct in the purchase may have been from any imputation of the want of good faith. In many parts of the country a quitclaim, or a simple conveyance of the grantor's interest, is the common form in which the transfer of real estate is made. A deed in that form is in such cases as effectual to divest and transfer a complete title as any other form of conveyance. There is in this country no difference, in their efficacy and operative force, between conveyances in the form of release and quitclaim, and those in the form of grant, bargain, and sale. If the grantor, in either case, at the time of the execution of his deed, possesses any claim to or interest in the property, it passes to the grantee. In the one case—that of bargain and sale—he impliedly asserts the possession of a claim to or interest in the property; for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess, without asserting the ownership of either. If in either case the grantee takes the deed with notice of an outstanding conveyance of the premises from the grantor, or of the execution by him of obligations to make such conveyance of the premises,

or to create a lien thereon, he takes the property subject to the operation of such outstanding conveyance and obligations, and cannot claim protection against them as a bona fide purchaser. But in either case, if the grantee takes the deed without notice of such outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a bona fide purchaser upon showing that the consideration stipulated has been paid, and that such consideration was a fair price for the claim or interest designated. The mere fact that in either case the conveyance is unaccompanied by any warranty of title, and against incumbrances or liens, does not raise a presumption of the want of bona fides on the part of the purchaser in the transaction. * * * * The character of bona fide purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise as often, though, we think, inadvertently, said, either from the form of the conveyance, or the presence or the absence of any accompanying warranty."

A deed of the land instead of a pure quit claim of all interest in the land is not a quitclaim, such as is held to pass title subject to equities only.

U. S. vs. Cal. & O. Land Co., 13 Sup. Ct. Rep. 458;

Same vs. Dalles Military Road Co., id. 465.

Even in those places where the rule Appellant contends for exists, the exceptions and qualifications thereof nullify it in this case. When the purchaser

gets a warranty deed, a quitclaim in the prior chain of title is of no effect as notice.

23 Am. & Eng. Encyc. Law; 2nd Ed. p. 572.

VIII.

The authorities are much divided as to the sufficiency of prior indebtedness as a consideration to entitle one to protection as a bona fide purchaser, and any other equity in a particular case may turn the balance and we submit the peculiar equities in this case above set forth. To the extent there passed a present consideration there is protection under all the authorities, and where a present consideration passes in addition to a prior debt, protection should be given for a whole debt. The present advance of more money, receiving security for the newly incurred and prior debt, especially when the latter is a large amount is the equivalent of an extension of time, which according to all authority is sufficient.

24 Am. & Eng. Encyc. Law, 2nd Ed., 139-140.

IX.

Complainant entirely misconceives the relation to this case of the absolute deeds to Idaho Trust Co. to secure money. The authorities cited from England and Ala that absolute deeds to secure money are a "badge" of fraud are in conflict with most other decisions, and besides are cases involving creditors only and hold it a badge of fraud on creditors only. Here was no fraud because the transaction was recorded in the minute book of Idaho Trust Co. and could not be nor was it attempted to be concealed and it was evidenced by written contract which recited the deed was given to secure money. Vol. 5, p. 1925-26-33-34-37. A right of foreclosure would follow a default without any express provision therefor. The provision against sales without written consent and authority of mortgagors referred only to voluntary sales and in case of such filled the double purpose (a) of giving the grantee definite authority of the grantors for the disposition to be made of the property and (b) definitely closing out grantors right of redemption after the sales.

It is respectfully submitted that the decree below should be affirmed.

JAMES E. BABB,

Lewiston, Idaho.

Solicitor for said Appellees.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant, No. 2209
vs.

William F. Kettenbach, George H. Kester,
Clarence W. Robnett, William Dwyer, and
Frank W. Kettenbach, Appellees.

THE UNITED STATES OF AMERICA,
Appellant, No. 2210
vs.

William F. Kettenbach, George H. Kester,
Clarence W. Robnett, William Dwyer, The
Idaho Trust Company, a Corporation, The
Lewiston National Bank, a Corporation,
The Clearwater Timber Company, a Cor-
poration, Elizabeth W. Thatcher, Curtis
Thatcher, Elizabeth White, Edna P. Kes-
ter, Elizabeth Kettenbach, Martha E. Hal-
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THE UNITED STATES OF AMERICA,
Appellant, No. 2211
vs.

William F. Kettenbach, George H. Kester,
and William Dwyer, Appellees.

BRIEF OF RESPONDENTS

PEYTON GORDON,
Attorney for Appellants.
GEORGE W. TANNAHILL,
Attorney for Appellees.
For whom he appears.

Appeals from the District Court of the United States
for the District of Idaho, Central Division.

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BRIEF OF RESPONDENTS

STATEMENT.

These several actions were tried at one and the same time under an agreement that the evidence in support of the particular entries involved might be applied to the particular entries referred to in the

different bills, and a decision rendered based upon the evidence the same as if the evidence in each particular case had been taken at separate times, and repeated in the various actions. This agreement was made in the lower court for the purpose of avoiding repetition of the evidence and the enlargement of the record.

A fair statement of the facts appears in the decision of the Honorable Frank S. Dietrich, who tried the cases (Vol. 1, pp. 256 to 365 of Record), and we feel that we could add but little to the comment of the learned trial court in that opinion. The Court will observe that the trial court in its opinion took each individual entry and considered the evidence and the law as it applied to the same.

The three actions are based upon practically the same state of facts and the reason for filing the separate actions was for the purpose of making other subsequent purchasers parties, and adjudicating the rights of the various claimants. The various bills in equity charge the acquisition of land in violation of the criminal statute, and by conspiracy, fraud, collusion and agreements with the various entrymen.

We will first call the Court's attention to amended bill in equity No. 388 (Page 329 of Record).

There was stricken from this bill all of paragraph two. Paragraph three charges conspiracy by William F. Kettenbach, George H. Kester, William Dwyer, Clarence W. Robnett and Frank W. Kettenbach, and the various entrymen, and charges in substance :

“That the said defendants did unlawfully, corruptly, combine, conspire, confederate and agree together with each other, and with divers other persons, some of whom are hereinafter named, and others of whom are to the complainant unknown, and did form, make and enter into an unlawful, corrupt and fraudulent conspiracy, combination and agreement with each other, and with other persons aforesaid for the purpose and to the end of defrauding the complainant of the title and ownership of diverse large tracts of public land then owned by the Complainant. * * * ”

This is substantially the charge made in each of the bills, and as we understand the rule, fraud must be proved in relation to each and every entry, and that the defendants, George H. Kester, William F. Kettenbach, and William Dwyer, participated in the fraudulent conspiracy by means of which the land was acquired. Paragraph nine sets forth the names of the various entrymen, and the description of the land, and in order to correctly determine whether or not fraud existed in relation to the vari-

ous entries, it will be necessary to refer to the evidence in support of such entries.

We are not unmindful of the contention of the Government that the Timber and Stone law limits the amount of land which an individual can acquire thereunder to 160 acres, and by reasons of the fact that the defendants have acquired more than 160 acres they have acquired the same in violation of the Timber and Stone act. This contention is untenable, and in violation of not only the decision of this court in *United States vs. Barber Lumber Co. and others*, 194 Fed., p. 24, but also the case of

St. Louis Smelting & Refin. Co. vs. Thomas F. Kemp, 104 U. S. 636-657; 26 L. Ed. 875-882.

In the last mentioned case, on page 880 the court says:

"It authorized the issue of patents for claims on veins or lodes of quartz or other 'rock in place' bearing gold, silver, cinnabar or copper. Placer claims first became the subject of regulation by the Mining Act of July 9th, 1870, which provided that patents for them might be issued under like circumstances and conditions as for vein or lode claims, and that persons having contiguous claims of *any size* might make joint entry thereof. But it also provided that no location of a placer claim thereafter made should exceed one hundred and sixty acres for one person or an association of persons. The Mining Act of May 10th, 1872, 17 Stat. at L., 91,

declared that a location of a placer claim subsequently made should not include more than twenty acres for each individual claimant. These are all the provisions touching the extent of locations of placer claims, and they are re-enacted in the Revised Statutes, Secs. 2330, 2331. A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary. * * *

"In addition to all this, it is difficult to perceive what object would be gained, what policy subserved, by a prohibition to embrace in one patent contiguous mining ground taken up by different locations and subsequently purchased and held by one individual. He can hold as many locations as he can purchase, and rely upon his possessory title. He is protected thereunder as completely as if he held a patent for them, subject to the condition of certain annual expenditures upon them in labor or improvements."

This decision seems to be very much in point. The Timber and Stone law prohibited the making of more than one timber and stone entry of 160 acres, but there is no prohibition of the amount one individual may purchase. He may acquire by purchase all of the claims he can pay for.

In line with these decisions is the case of

Williamson vs. United States, 207 U. S.,
425;

United States vs. Budd, 144 U. S., 154;

United States vs. Detroit Lumber Co., 200 U. S. 321;

United States vs. Clark, 200 U. S. 601.

THE EVIDENCE.

We now call the court's attention to the following entries and the evidence of the Government in support of its contentions, omitting for the time being any reference to the evidence on the part of the defendants or of the defendants themselves.

CARRIE D. MARRIS.

We first call the Court's attention to the claim of CARRIE D. MARIS. The evidence is found at pages 2069 to 2084, direct examination, and pages 2084 to 2090, cross-examination. The witness on page 2070 identifies her application to purchase, the non-mineral affidavit, the sworn statement, and the cross-examination taken at the time of making her final proof, and the various other papers in support of her entry. She also testified at page 2071 that at the time she made her entry she was a clerk in a dry-goods store; that Clarence W. Robnett first spoke to her about taking up a claim; and on page 2072 the witness testifies:

"A. Well, he told me it wasn't necessary for me to have the money. Well, I told him I didn't see how I could get it, and he went on to explain that if I went out and took it up, that he would furnish all the expense money, find me a purchaser; that when I had proved up on the claims he would find a buyer, and then the expense money was to be taken out of what I got for the claim, and the profits were to be divided half between himself and myself."

The witness also testifies that Robnett furnished her the money with which to pay her expenses for publication fees, and for the purchase of the land. On page 2079 the witness answers in reply to a leading question by counsel for the Government as follows:

"Q. Now, when you took up this land, Mrs. Rexford, did you understand that you were to convey it to whoever Robnett told you to, and he was to divide it?

A. Well he said he would find a purchaser."

A fair inference from the witness direct examination is that she took up the land, and Robnett was to find a purchaser for it. The witness testifies on cross-examination, beginning at page 2084, that she does not remember of signing any instrument to Mrs. Sullivan, notwithstanding there was a mortgage to Mrs. Sullivan. The evidence shows clearly that Robnett borrowed the money from Mrs. Sullivan with which to make final proof. The witness

did not deed the land to Robnett until immediately prior to her marriage. On page 2085 the witness testifies :

"Q. Now, after you made your final proof, you held the land how long before you finally deeded it to Mr. Robnett?

A. I deeded it to him on the 2nd of June, along late in the afternoon, and I was married the next day. I was married on the 3rd of June, and I deeded it to him on the 2nd of June, 1903.

Q. And you made your final proof November 22, 1902."

The witness also testifies on pages 2085 and 2086 that she frequently talked with Clarence W. Robnett in the meantime about selling the land, At page 2085 the witness answers :

"A. Ofttimes, yes, and he would keep me thinking that in just a day or two, or a few days or a week, he would have a buyer for it. I even sat in that room, office in the bank, while he telephoned. I didn't know who to, but he made me think he was talking to a man in Moscow; to a man that was just ready to purchase the land; and when I left the office that day, I thought I would have my money in a very few days. He was talking over long distance, and I listened to the conversation."

On page 2087 the witness testifies that she never knew the land was sold to Kester and Kettenbach; and on page 2088 she testified that she never knew that Robnett sold the land at all, and on page 2086

the witness testifies that she never got a cent after she was married. It seems that Robnett even sold the land and did not pay the entrywoman what he had agreed to pay her for the same. On page 2089 the witness testifies:

“Q. Now, at any of these times when you entered the bank to see Robnett, you had no conversation with Kester or Kettenbach?

A. Never. Clarence Robnett is the only one I ever had any dealings with at all.

Q. You never had any agreement or understanding that you would sell your land to Kester and Kettenbach?

A. Never. That was never mentioned; as to who were the buyers he never mentioned except the once when I supposed he was talking to Moscow, then he told me that a man by the name of Nat Brown was the buyer. That was the only name that he ever mentioned as a purchaser—no, I believe there was a lumber company, but I don't believe I remember who the company was—some company, anyhow—but the only individual he mentioned was a man by the name of Nat Brown, and I supposed he was talking to him when I overheard that conversation over the telephone in the bank. * * *

Q. In fact, you had no definite agreement to sell your land before you made your final proof, did you?

A. Well, now, the first time he offered me the proposition to take this claim he told me he would go ahead and see to the selling of it, and I would have no more trouble, and all I would be required to do would be to take the land and prove up on it, and he would see to the rest.

Q. He would find you a buyer?

A. Find a buyer and sell it for me, and he would divide the profits; that was thoroughly understood then.

Q. And there was no name mentioned as to who you should deed it to?

A. No, there wasn't.

Q. And there was nothing said about you deeding it to anyone?

A. No, there wasn't."

On page 2521 of the record appears the affidavit of Clarence W. Robnett in relation to this entry, a portion of the affidavit being as follows:

"That the said George H. Kester and William F. Kettenbach knew nothing about the land, or the acquiring of the same by the said Carrie D. Maris for more than a year after final proof was made, and was only a very short time after affiant opened negotiations with the said George H. Kester and William F. Kettenbach for the purchase of the land before the sale was made.

That no agreement of any kind or nature existed between affiant and said George H. Kester and William F. Kettenbach, or between affiant and the said Carrie D. Maris for the purchase of the land prior to the time the sworn statement was filed or prior to the time final proof was made, and no agreement of any kind or nature ever existed between George H. Kester or William F. Kettenbach and the said Carrie D. Maris to the knowledge of affiant prior to the time final proof was made for said tract.

C. W. ROBNETT."

Subscribed and sworn to, July 1, 1909.

The affidavit is set out in full at pages 2521 to 2524 inclusive.

The defendants, Kester, Kettenbach and Dwyer, also testified that no agreement to purchase the tract of land was ever made prior to the time of final proof and that no negotiations for the purchase of the same were begun until more than a year after final proof was made; that the land was purchased in the usual course of business and a valuable consideration paid therefore, to-wit, the sum of \$1,600. It occurs to us that if such evidence as this will not protect an entry, it is hard to conceive of a circumstance where an entry could not be cancelled in case it is attacked for any purpose.

On page 3333 the defendant, William Dwyer, testifies that he cruised the Carrie DeMaris claim. And he further testifies as follows:

“Q. How did you come to cruise it?

A. A couple of years or three years ago I think I was in Pierce and I got a long distance call, and Mr. Kester asked me if I would go and cruise a piece of land over on Reed's Creek, over in Section 12, and I told him I would, I guess. * * * And so a few days later he called me up at Pierce and told me to go and look at that claim, and so I did; and when I came back Mr. Kester told me he had bought it; and that is all I know about the Carrie D. Maris claim.”

He also testifies that he had nothing to do with her filing upon the claim or with purchasing it or the final proof.

JOHN H. LITTLE.

The evidence of John H. Little appears at pages 1609 to 1623, direct examination, and 1623 to 1627 cross-examination. It is charged that the entry of John H. Little was fraudulent in that an agreement existed prior to the filing of the sworn statement whereby the defendants George H. Kester and William F. Kettenbach and C. W. Robnett should acquire title to this tract of land. It is necessary to refer briefly to the evidence of John H. Little in relation to his acquiring title to the land. On page 1616 the witness testifies that the first agreement was that Robnett was to procure the money from Curtis Thatcher for the purpose of paying the purchase price and the necessary expenses; that Curtis Thatcher was unable to go through with the deal and Robnett had to make other arrangements for the money. This is in corroboration of the evidence of Mr. Kester wherein Mr. Kester testified that Robnett came to him on the day final proof was to be made and applied to him for the loan for the purchase of the land; that no agreement of any kind or nature was ever talked of whereby he should purchase the land (Evidence of Kester, pg. 3447-8). Mr. Little made his final proof, purchased the land, mortgaged the same for the purchase price, and

after holding it for some time he sold it to William F. Kettenbach; and on pages 1619 and 1620 the witness testifies in response to a question from Mr. Gordon:

“Q. And did you have a talk with him (Kester) before you turned the property over to him and told him about your conversation with Robnett?

A. Yes, sir; he told me he had nothing to do with what Robnett may have had to say in regard to that, because Robnett was in with some other interest on a deal of some kind to sell the timber, and that he had been unsuccessful. The timber market was dead, and he couldn't wait any longer, he said that he had to have his money.”

On page 1623 the witness testified as follows:

“Q. Mr. Little, how long did you keep your land after you made final proof before you negotiated a sale of it—before you talked of selling it?

A. Well, a short time afterwards I had a talk with Mr. Robnett in regard to it, and reminded him of his promise to dispose of it.”

Here the witness tells about Robnett stating that he was forming a pool in which he had included many claims, and on the same page he testifies:

“Q. Now, did he say who was in that pool?

A. No, he didn't mention any names.

Q. He never mentioned Kester's and Kettenbach's names?

A. No, he never mentioned their names to me at any time.

Q. Now, how long before October 24th, 1904, was it before you talked to Mr. Kettenbach about buying?

A. Well, I talked to him up the street here, right about opposite this next corner, one night—stopped him in his rig, and I talked to him about it, and he said he didn't know anything about it, if I remember correctly; that he wasn't buying any timber; but to go ahead and see Clarence; he said, 'Clarence is looking after that thing the best he can.' He said he knew he was in some kind of a deal to dispose of some of the claims for the boys.

Q. Well, what boys?

A. Well the boys around town here that were in that country up there where I was—Storer and myself and Mr. Benton and some others.

Q. Kettenbach told you to try to sell to someone else, didn't he?

A. Yes; he told me to try to sell to someone else. Well, I told him that Robnett claimed that according to our agreement he was to sell my claim for me, it was in the pool, and I couldn't see how I could sell to anyone else as long as it was in that pool. They explained to me that the land was more valuable—that they could get more out of it—if the land was all together.

Q. Then your arrangement with Robnett was not carried out?

A. No, it was not.

Q. And did you say that Kettenbach told you that he had nothing to do with Robnett's deal, or the sale that Robnett was to make of the land, or something of that sort?

A. Well yes, if I remember correctly. It is all so long ago that the deal nearly all has gone from my mind, except just the main points of the case.

Q. You had no contract or understanding or agreement, either express or implied, with Mr. Kettenbach or Mr. Kester or Mr. Dwyer, to sell them this land, before you filed your sworn statement?

A. No, sir.

Q. Or before you made your final proof

A. No, sir.

Q. And nothing until more than a year after you made your final proof—October 24th, 1904—some time about that time?

A. I don't remember the dates at all.

Q. About the time you executed the deed?

A. Yes, sir."

In this particular case it seems that the entryman tried to sell his land to various parties and finally persuaded W. F. Kettenbach to purchase the land at the price for which it was sold. Kettenbach was not anxious to acquire the land; he was not purchasing land at that time, and it seems that the price he paid was more than the entryman could obtain from anyone else. It seems very strange that such evidence as this would support a charge of fraud and especially the charge of a prior agreement to purchase the land prior to the filing of the sworn statement.

ELLSWORTH M. HARRINGTON.

Ellsworth M. Harrington's direct examination begins on page 1347. On page 1350 the witness testifies that he asked Mr. Robnett something about tak-

ing up a timber claim. On page 1355 the witness testifies in response to a leading question that Robnett first broached this subject to the witness and suggested that he (Robnett) advance the money for the purpose of taking up a claim, and that Robnett was to get a commission out of it for selling the claim.

“Q. Then he was to sell the claim?

A. No, he wasn't to sell it—if he did sell it he was to get a commission for selling it. There wasn't no agreement that he was to sell it.

Q. You mean you didn't have any written agreement?

A. No, nor no verbal agreement in that way; not positive. He was dealing in timber claims, and if he had a chance to sell it, he had my permission to sell it.

Q. That was the original understanding, was it not?

A. I don't think there ever was any exact understanding made about it. It was a kind of a—I don't know whether you would call it a mutual agreement or not; we were brother in laws, and naturally, as he was in the timber business he would handle my claim for me.”

The witness further testifies on page 1356 as to Robnett trying to sell the claim after final proof was made. On page 1360 the witness testifies that he sold the land to W. F. Kettenbach; that he signed a deed bearing date May 8, 1906; the patent was issued August 3, 1904; the sworn statement was filed

March 20; Receiver's receipt and Register's certificate issued June 15, 1903. It will thus be seen that the entryman held his land from the time he made his proof on June 15, 1903, until May 8, 1906, before he made the sale.

On page 1366 the witness testifies that he held the land three years after making final proof, that he never talked with Mr. Kettenbach regarding a sale of the land at all; that he had some conversation with Robnett regarding the sale of the land, but never talked with Robnett concerning a sale of it to Kettenbach. The evidence of the witness is corroborated by the evidence of William F. Kettenbach and the other witnesses in relation to the acquiring of title to this land.

WREN PIERCE.

We do not consider it necessary to enter into a lengthy discussion concerning the entry of Wren Pierce, for the reason that Wren Pierce did not appear and testify. The only evidence in relation to this being a fraudulent entry is an unsupported statement of Robnett which is inconsistent with belief, and in conflict with the evidence of Kester and Kettenbach. It is sufficient to say that the evidence

conclusively shows that there was no fraud in the acquisition of title to this particular tract of land.

BENJAMIN F. BASHOR,

The evidence of Benjamin F. Bashor appears at pages 2090 to 2101 of the record. Mr. Bashor testified that Mr. Robnett first spoke to him concerning the location of a timber claim; that there was but little said about it; it was in the early part of the year 1903, either January or February. He simply told the witness it was a chance to make some money; that there were timber claims being taken up. On page 2093 the witness testifies that he gave his note for the location fee; that he gave his note for the entire fee for location, of \$100 or \$125, and \$400 for the purchase of the land. The witness gave Robnett a mortgage for the amount. This was on the same day he made his final proof; that he had no conversation with Mr. Kettenbach. On page 2099 the witness testifies on cross-examination as follows:

"Q. You had no arrangement or understanding with Mr. Robnett to sell this land before you made your proof?

A. No.

Q. And no such arrangements with Kettenbach and Kester?

A. No sir; never a word said among any of us or either of us before final proof was made.

Q. How long was it after you made your final proof before you sold your land?

A. As near as I remember, it was about—it must have been in the neighborhood of three years, before the conveyance was made."

The witness also testified he got \$1100 for the claim. The evidence of this witness is corroborated by the evidence of William F. Kettenbach and is certainly sufficient to show that this entry is valid and should be sustained.

JOSEPH B. CLUTE,

The next entry is that of Joseph B. Clute, which is included in the amended bill by mistake as the same was intended to be and was included in Bill No. 406. We will refer more particularly to this entry in our reference to Bill No. 406.

FRANCIS M. LONG, JOHN H. LONG,

BENJAMIN F. LONG.

These three entries may properly be considered together and a reference to the evidence of John H. Long will be sufficient as it appears that he was acting in the interests of the three. We will call attention, however, to a repetition of the entry of Ben-

jamin F. Long, the first description wherein the land is described as Section 18 being an error. The only land entered upon by Benjamin F. Long was in Section 13.

We call attention to the evidence of John H. Long and the statements therein made, appearing on page 1254 of the record, wherein the witness testifies:

"A. No; I had spoken to him (Robnett) some time prior to that about taking up a claim, and at that time he didn't have no claim. I guess he hadn't entered into the timber business, or something, and then afterwards he thought he had a good proposition and called me in .

* * * *

"A. The proposition he made, as near as I can remember, was that he would locate me on a timber claim, and he would loan me the money with which to prove up with, and he would charge me \$125 for location fee, I believe, something like that, and I was to pay \$200, I believe, for the use of this money, and the risk as he explained it, in making this loan. I think he said he had no interest in it except that he must have a little bonus, as he called it, or something like that, to insure him a little something for his trouble, and for the man that furnished the money—that loaned this money, that had money to loan for that purpose; he wanted a little something out of it.

* * * *

"A. And I think that this was to be incorporated into a mortgage after the final receipt was received.

* * * *

"A. My father, brother and I went to the bank and gave a note one day after date.

* * * *

"Q. What were you to do with your land after you had made your final proof?

A. Well, there was nothing said as to what we were to do with it any more than he might be able to sell it, and realize a profit of about \$800 on it.

Q. Didn't he guarantee you so much?

A. No, he said, I may sell it for \$800.00.

A. Was he to have the right to sell it for you?

A. No, not particularly; anybody had the right to sell it.

Q. I am speaking now about what your conversation was.

A. I asked him if I had the privilege of selling this to anybody I wanted to, and he said I had."

On pages 1270 and 1272 appears an escrow agreement for the sale of this land to one J. M. Hayden. This agreement was executed by Mr. Long and Mr. Hayden long prior to the time the land was purchased by Mr. Kettenbach.

On pages 1272 and 1274 the witness relates certain conversations with Mr. Kettenbach relative to the sale of the land to him, and the purchase of a note by Mr. Kettenbach from Robnett.

On page 1277 the witness testifies that the affidavit he made at the time of making final proof is true. In this affidavit he states that he has no con-

tract or agreement either directly or indirectly with anyone for the purchase of the land.

On pages 1278 to 1297 appears the evidence of Francis M. Long, and on page 1280 the witness testifies:

“Q. And was there any understanding as to how much you were to get out of this claim?

A. No, sir.

Q. Wasn't anything said about that?

A. No sir.

Q. What were you to do with the claim after you got it?

A. We intended for to pay this claim out—get money and pay this claim out. I had no money of my own that I couldn't get a hold of at that time, is the reason I borrowed this money. We aimed to pay it out and keep the claim.

Q. What were you going to keep it for?

A. Well, for the value of the timber.”

On pages 1296 and 1297 the witness testifies that he had no contract or agreement for the sale of the land prior to his final proof, and on page 1296 he states that his affidavit that he made at the time of filing his sworn statement was true.

The evidence of Benjamin F. Long, appearing at pages 1297 to 1317 of the record, is in substance the same. On page 1314 and 1315 the witness testifies that he had no agreement for the sale of the land prior to the time of filing his sworn statement, and making his final proof, and that the affidavit he

signed to that effect was true. It appears that the defendants did not desire to purchase the land; that after several efforts and negotiations Mr. Kettenbach was finally induced to purchase the same. We can hardly understand under what theory the Government could consistently contend that these entries were fraudulent and should be cancelled.

BERTSAL H. FERRIS.

The evidence of Bertsal H. Ferris appears at pages 873 to 898 of Record. On pages 873 and 874 the witness tells of meeting Robnett and engaging in conversation with him concerning filing upon a timber claim. It appears conclusively from the evidence that the witness had no agreement with Robnett for the purchase of the land prior to the time he made his final proof.

On page 896 the witness testifies that the affidavit he made when he signed his sworn statement that he had made no contract either directly or indirectly for the sale of the land was true. On page 897 the witness testifies:

“Q. Then, that affidavit that you made at that time was true? A. Yes sir.

Q. Now, you had had no talk with Mr. Kester or Mr. Kettenbach or Mr. Dwyer about it up to the time you made your final proof, had you?

A. No sir.

Q. The first talk you had with either of them about it was after Mr. Kettenbach notified you that your note was due?

A. No, I had no talk with him then; he simply wrote me those notes .

* * * *

Q. And you had kept your land about—how long did you say you kept it before you sold it?

A. Well, it was two or three years; I think it was two years anyway.

Q. And that is your first agreement or contract that you had made for the sale of your land?

A. Sir?

Q. That was the first contract or agreement you had made for the sale of your land up to that time?

A. Which?

Q. The one you made two or three years afterwards, when you sold to Kettenbach?

A. When he took it on the mortgage.

Q. Had you tried to sell it to anyone else?

A. I gave an option to sell it.

Q. Who did you give an option to?

A. Fred Emory.

Q. Did you give an option to anyone else?

A. I think I gave two; I don't remember who the other one was to."

The evidence of the witness is not in conflict with the evidence of Mr. Kettenbach in relation to the circumstances surrounding the purchase of land, and certainly if the entryman is to be believed, and if Mr. Kettenbach is to be believed, this entry should remain intact. Mr. Kettenbach did not even desire

to purchase this tract of land, and finally did purchase it with a great deal of reluctance.

GEORGE RAY ROBINSON.

The evidence of George Ray Robinson is to the same effect as that of Bertsell H. Ferris. In fact, they visited Mr. Robnett together and had the same arrangements for the sale of the land. Mr. Robinson's evidence is found at pages 1317 to 1346 of the record. On pages 1319 to 1321 the witness testifies to his conversations with Robnett relative to these particular tracts of land, and his arrangement for the taking up of a claim, the procuring of the money for the payment of the purchase price, the payment of the location fee, and the giving of a mortgage upon the land for the purpose of securing the same. On page 1322 the witness testifies:

“Q. When you filed on this land, and prior to the time you filed on this land, after your first talk with Mr. Robnett, what was your understanding you were to do with this land?

A. Well, the understanding was that he had a buyer in view, and he was to sell the land for us.

Q. Now, what was your understanding? Was it your understanding that you were to sell it to whom Mr. Robnett told you?

A. Well, not exactly that; he was to sell the land in case he could, but in case he couldn't

or didn't sell it, we had the privilege of selling it to someone else.

Q. I understand that, but until you found out that he couldn't sell it, your understanding was that you were to let him have the sale of it, is that correct?

A. Well, I don't think that; I don't know exactly how that could be, but I know I didn't try nor didn't have any intention of trying to sell it, but I depended on him to make the change for me.

Q. That is what I am trying to get at, Mr. Robinson, if your understanding with Mr. Robnett before you took up this claim was that he was to control the sale of it.

A. Yes, he was to sell it, but I believe that in case I found a buyer that would give more I would have sold it.

Q. When did you get that notion into your head?

A. Well, I don't know; I don't believe there was anything in the contract that would have kept me from that, but at the same time I didn't have any intention of doing it.

Q. When did he tell you that he would sell that land?

A. About the first of September, I believe."

On page 1340 the witness testifies on cross-examination that he made his final proof about June 21st, 1903, and deeded the land October 16, 1905, showing that he held the land for more than two years after making final proof before the sale was made; that his first conversation with Mr. Kettenbach regarding the sale of the land was a short time prior to his

making the same. On pages 1341 and 1342 the witness testifies:

“Q. Do you remember overtaking Mr. Kettenbach on the street one time and talking to him about this claim and about your note and mortgage?

A. I believe I did.

* * * *

Q. Now, don't you remember that Mr. Kettenbach told you to keep your claim and to pay the interest or the principal in \$5.00 payments?

A. Yes sir.

Q. You remember that, do you?

A. Yes, it was some time—I don't remember whether it was this particular time you think of or not.

Q. Well, at some time during these negotiations with Mr. Kettenbach he told you to keep your claim and pay him in \$5.00 payments, or any payments you could make?

A. Yes.

Q. To pay him \$5.00 a month.

A. Yes, he wanted me to do that.

Q. Now, didn't you tell him that you couldn't sell your claim and you didn't want to keep it?

A. Yes.

Q. Didn't he also tell you that if you wasn't satisfied if you would come in he would look over the papers and see how much he could allow you for the claim?

A. Yes.

Q. And he had carried your note then something over a year; upwards of two years?

A. Yes.

Q. And then you went to the bank in a day or two for him to figure up what he could give you?

A. I did.

Q. And it was at that time that you reached the agreement to sell him the land?

A. Yes sir.

Q. And you had had no agreement with him before that time?

A. No, no agreement."

On page 1343 the witness testifies that he gave Robnett certain options upon the land, and thinks he gave him two options. And on pages 1344 and 1345 the witness testifies that the affidavit he made when he signed his sworn statement was true, and testifies further as follows:

"Q. And the only understanding you had was that you would give a mortgage on it to secure the money you borrowed?

A. Yes.

Q. That is the only contract you had, and you never had any contract with either Mr. Kester, Mr. Kettenbach or Mr. Dwyer until your agreement some two years after you made your final proof to sell it to them? A. No sir."

It appears that the defendant Kettenbach purchased this claim with a great deal of reluctance and endeavored to persuade the entryman to retain his claim and pay him in small payments, and after the entryman was unable to sell the claim to anyone else for more money he finally sold the same to the defendant Kettenbach.

CHARLES W. TAYLOR

The evidence of Charles W. Taylor in relation to his entry is found at pages 1058 to 1110 of the record. The witness testifies on page 1060:

"Q. What did he (meaning Jackson O'Keefe) say about taking up a timber claim?

A. He just simply asked me if I didn't want to take up a timber claim. He said he was going to take up one, and wanted me to go with him, something to that effect. * * *

The witness also testifies that Jackson O'Keefe wanted him to see his brother Edgar J. Taylor, Joseph H. Prentice and Edward Dammarel.

On page 1062 the witness testifies:

"A. At the time he spoke to me about that, the first conversation he had with me about he would furnish me the money, he told me that he would buy the claim of me."

The witness also testifies that he was to give him \$150; also that he was to tell Mr. Dammarell and Mr. Prentice the same thing. On page 1063 the witness testifies that O'Keefe told him that George Kester was going into the same neighborhood with a crowd to take up claims. The witness did not remember whether he said Kester was taking up for himself or just how he did say it. The witness also testifies to going to the timber, filing upon a claim, getting the money from Mr. O'Keefe to pay the purchase price, the publication of his notice, and

the various steps taken to purchase the land. On page 1069 the witness testifies:

"Q. Were you to sell it to him, or to someone else?

A. Well, he was the one I was dealing with; he never told me about selling to—never mentioned nobody else's name about me selling it to.

Q. Did he give you to understand that he was acting for someone else?

A. No sir, not then at all.

Q. Did he later?

A. Later on he told me he couldn't do what he had agreed to.

Q. Now, we will get to that after awhile. Did he tell you he was carrying on that transaction for Mr. Kester?

A. No sir, he didn't say it in that way; that him and Mr. Kester was taking up this land.

Q. Was that the way he said it?

A. Something like that.

Q. And that you were to convey it to him to get the \$150?

A. Somethnig like that."

On page 1070 the witness testifies that he borrowed the money and gave a note for it; that he was to sell the land to Mr. O'Keefe after he got a patent for it, and testified further as follows:

"Q. But that arrangement was made before you ever went to see the land is that correct?

A. Yes sir, but he changed that though, contradicted himself, and said he couldn't do that.

Q. When did he make that statement?

A. When we was on the road to the timber.

Q. Did he tell you who had advised him that it couldn't be done that way?

A. Yes, sir.

Q. Who A. George Kester."

On pages 1071-1072 the witness further testifies that George Kester told him that he could not make an arrangement to purchase the land prior to the time final proof was made. On page 1086 the witness identifies an affidavit which he made in relation to his entry and testifies that the statements contained in that affidavit are true. We call the Court's attention to this affidavit for the reason it is in substance the same as the affidavit made by Edgar J. Taylor, Joseph H. Prentice and Edgar H. Dammarel.

On page 1088 the witness refers to an affidavit which he was compelled to execute for Special Agent O'Fallon. A desperate effort has been made to compel the witness to re-affirm the statements contained in the affidavit he made for these special agents. This affidavit was made at a time when the witness appeared before the grand jury at the request and dictation of special agents Goodwin and O'Fallon and did not state the truth. The witness testifies on page 1088 that these special agents told the witness that if he did not make the affidavit they would send him to the penitentiary. The witness testified that

he made a statement to them and that they told him they knew he was lying about it, was not telling the truth, and that they knew the arrangements he had with O'Keefe; and the witness further testifies as follows:

“Q. Yes, when you made your first statement to them down there at Boise before you made this affidavit, you was not lying to them, was you?

A. No sir, I was aiming to tell the truth.

Q. Did they ask you questions, and was this affidavit made up from questions and answers they asked you, this affidavit you made for Mr. O'Fallon down there at Boise?

A. Yes sir.

Q. And did they tell you that they knew that Kester and O'Keefe were in together?

A. Yes sir.

Q. And it was after that that this affidavit was made up, this affidavit that you made down there for Mr. O'Fallon and Mr. Goodwin?

A. After that that affidavit was made up?

Q. Yes, after they told you they knew Mr. Kester and O'Keefe was in together?

A. Yes sir, that was the last thing they done, was to make that affidavit, before I left Boise.

Q. Wasn't it a matter of fact that Mr. O'Keefe told you that Kester and some other parties were going up into the timber to take up claims?

A. Yes sir.

Q. Mr. O'Keefe never told you that he and Kester were in together and that they were going to have people locate on timber claims, did he?

A. I didn't understand it that way. He told me the second time I talked to him about it—that was the time we went up there to take up timber claims,—that was the time he told me he couldn't make no agreement with me.

Q. Didn't he tell you that Kester told him that that kind of an agreement was against the law?

A. Yes sir.

Q. And it was the first arrangement that you was talking to Mr. O'Fallon and Mr. Goodwin about that was embodied in this affidavit, was it not?

A. Yes sir.

Q. Did you tell Mr. Goodwin and Mr. O'Fallon and Mr. Ruick about the second arrangement you and Mr. O'Keefe had, that he couldn't make that kind of an agreement?

A. Yes sir, I told him that in the grand jury room.

Q. They didn't include that in your affidavit, did they?

A. I think I told him in the grand jury room; I know I told him that some time.

* * * *

A. There was some things asked me I think in the grand jury room that wasn't asked me there.

Q. Then this affidavit was made up from your talk with Mr. Goodwin and Mr. O'Fallon regarding your first arrangement with Mr. O'Keefe?

A. Yes sir.

Q. And it does not refer to your second arrangement with Mr. O'Keefe, where he told you that he couldn't make that kind of an agreement, that Kester told him it was against the law?

This affidavit don't refer to that, you remember that, don't you?

A. No sir, I don't think it does.

Q. After Mr. O'Keefe told you that he couldn't make an agreement with you, you considered that that arrangement you had made with Mr. O'Keefe was all off, didn't you?

A. Well, that was the way it looked.

Q. Well, wasn't that the way you understood it?

A. That was the way I understood it, that I had no agreement then.

Q. And you made no agreement from that time on until after you made your final proof?

A. No sir, there was nothing said about it then until I got my receiver's receipt."

The witness also testifies that he and his brother borrowed eleven hundred dollars from Mr. O'Keefe, which was used in paying for the land; that after making their final proof he and his brother talked over the advisability of selling the land. (Page 1092 of Record). That this conversation took place on their way home; that they went to talk to Mr. O'Keefe about it after they arrived home the next day or a day or two after; that they told O'Keefe that if they could get \$150 for the claim over and above that note they would sell it. Witness does not remember just what O'Keefe did say. He did not say much about it at that time. He was talking to the witness's brother regarding it. On page 1093 the witness testifies that after he returned home he

and his brother had made arrangements to sell to O'Keefe, which was the first time anything was said about it, and that he felt under no obligations to sell his land; that if he could have obtained more for it from someone else, he would have felt free to sell it.

On page 1095 the witness testifies that the affidavit he made when he filed his sworn statement, in substance: that he had made no other application under said act, and that he was taking the same in good faith and had made no agreement to sell the same, was true. It affirmatively appears from the evidence of Charles W. Taylor that the original understanding was that O'Keefe would buy the land after title was acquired; that he subsequently learned that such an arrangement as that was in violation of law; that he spoke to the witness, telling him he could not do that, but as the witness had started to the timber he would loan him the money to make his final proof, and pay the purchase price, taking his note for the same. This arrangement was agreed to by O'Keefe and the witness and they acted upon this understanding. After final proof was made the witness and his brother were returning home together; they talked about the advisability of selling their land, and concluded if they could get their notes back and \$150 over and above their expenses

they would sell their claims. They went to Jackson O'Keefe asking him to purchase the land. Jackson O'Keefe did not approach the witness. It is also clear, taking into consideration the evidence of the other witnesses, that O'Keefe told him he would purchase the land, but would give him a year to either redeem it or sell it to someone else; that the deeds were not recorded at that time; that this was the first arrangement that was made for the sale of the land subsequent to the time O'Keefe told the witness he could not carry out that arrangement. It is very clear that the affidavit made by the witness at the time of filing his sworn statement was true, and that the affidavit made by the witness subsequent thereto and identified by the witness was true. This affidavit identified by the witness is shown at page 4125 of the record, and is Defendant's Exhibit "E."

EDGAR J. TAYLOR.

The evidence of Edgar J. Taylor in relation to his entry appears at pages 1110 to 1139 of the record. On page 1111 the witness testified as follows:

"A. He (Charles Taylor) said he could take up a timber claim at the same time and get the

money to pay for it, and sell it for \$150.00 above cost, and sell it as soon as we got title.

* * * *

Q. Now, did you go to see Mr. O'Keefe about this claim?

A. Well, I never seen Mr. O'Keefe about it at all. I met him down here at the depot when we started to go to Pierce City, that was the first time we met him after that.

* * * *

Q. What did Mr. O'Keefe say to you?

A. He simply said he would furnish us the money to get the claim on and take our notes, and if we wanted to sell after we got title he would give us \$150."

The witness also testifies to the circumstances of his going to the land, his making final proof, the payment of location fee, and to giving his note for the money he borrowed from Mr. O'Keefe. And on page 1121 the witness testifies:

"MR. GORDON: Q. Well, state what the understanding was that you had with Mr. O'Keefe with reference to taking up this claim.

A. Well, the understanding I had was with my brother, that we could sell it for \$150 over and above costs after we had title. * * We could sell it to O'Keefe.

Q. Didn't you feel under any obligation to sell it to Mr. O'Keefe.

A. I did not.

Q. You assumed, then, that he was just going to furnish all the money to take this up, and you were under no obligation?

A. I considered that I was under obligation for the note I gave for the money.

Q. But you didn't give the note until after you got the money and you had been over the land?

A. Yes sir."

On page 1123 the witness testifies that Mr. O'Keefe wanted him to give a bond for a deed to secure the note, and the witness turned the Receiver's receipt over to him and gave a bond for a deed at the time. On page 1125 and 1126 the witness testifies that he did not know that he had parted with all interest in the land when he received the \$150; that he supposed he was giving a bond for a deed; and on page 1127 the witness testifies that he understood from Mr. O'Keefe that he could redeem the land at any time he could pay the note; that he did not receive the note back until after he returned from Boise where he had testified before the grand jury, and at that time all possibility of redeeming the land had passed. On cross-examination at page 1134 the witness testifies concerning his former testimony which is set out in full, showing that the witness' evidence now, taking the same as a whole, is not materially different from that given at the former trial. The witness testified at the former trial, at p. 535, Case No. 1605, as follows:

"Q. Your understanding with Mr. O'Keefe was that if you could sell that claim for more than \$600 before the maturity of that note, you

would be entitled to the excess, did you not?
The amount you could get over the \$600?

A. If I could get more for it?

Q. Yes.

A. Well, when I gave a bond for a deed, I thought I would have a right to redeem it and get more for it, if I could, at the time I gave the bond for the deed.

Q. Now, you say Mr. O'Keefe told you that he would not buy any land until after you got the title to it?

A. Yes.

Q. Mr. Taylor, you understood that you had no arrangement, contract or agreement with anyone to sell this land at the time you filed on it, or the time you made final proof, did you?

A. Yes sir, that was my understanding.

O. And if you had an opportunity to sell it to someone else for a thousand dollars more, you would have felt at liberty to sell it to them, would you not?

A. I would; yes, I would."

The witness also testifies on page 1135 that the affidavit he made at the time of filing his sworn statement was true. And he testifies that the affidavit he made before C. L. Thompson on the 30th day of November, 1906, was true. This affidavit appears at page 3134 of the Record, and is Defendant's Exhibit "G."

On page 1137 the witness testifies:

"Q. Mr. Taylor, regardless of what you may have said in any of these statements or affidavits or any of your evidence that you might have given heretofore, I will ask you to state whether

or not you understood that you had any understanding or agreement with anyone that you was to sell your land at the time you filed on it?

A. I did not; my understanding was that I was simply borrowing the money to file on it and had a right to hold it.

Q. And you supposed you had a right to redeem this land within a year?

A. Yes sir."

Taking the evidence of the witness as a whole, measured by the affidavit just referred to, the evidence of the witness is not in conflict with this affidavit, and the only logical conclusion to be reached is that the witness had no understanding or agreement for the sale of this land. Mr. Kester testified that no such agreement existed. We are at a disadvantage by reason of the fact that Jackson O'Keefe is dead and he is not here to explain the circumstances surrounding the purchase of this land, but a court of justice could not refrain from commending O'Keefe for abandoning an unlawful proposition, if it was ever undertaken, and certainly if any understanding ever did exist between O'Keefe and any of the Taylors for the purchase of this land, it was abandoned prior to the filing of any of the sworn statements.

JACKSON O'KEEFE.

Jackson O'Keefe's is the next entry, and there is no evidence in the record tending to show that this entry is fraudulent, except possibly the evidence of Clarence W. Robnett, which is denied by Mr. Kester and by other witnesses, and his evidence is impeached in so many particulars and is in direct conflict with so many credible witnesses that we do not consider it necessary to enlarge upon the same.

Defendant's Exhibit "F," the affidavit of Jackson O'Keefe, appears at page 3142 of the record, and we believe it worthy of consideration in view of the fact that Jackson O'Keefe is now deceased and could not be present to testify in person.

JOSEPH H. PRENTICE.

The evidence of Joseph H. Prentice is found at pages 1225 to 1252 of the record. A careful reading of Mr. Prentice's evidence will convince the court that there was no fraud in relation to this entry. On page 1226 of the record, the witness testifies: That Mr. Charles W. Taylor came to the witness, asked the witness if he wanted to make some money the witness told him he did if it could be done honestly, and then he spoke about taking up a timber claim.

"A. I told him I had no money to make an entry or prove up, and he says: 'Uncle Jack will loan you the money'; (speaking of O'Keefe); and I says, 'Are you sure?' and he says, 'Yes, I am getting money from him. and Ed is getting money from him, and he told me he would loan it to you.'

* * * *

A. Oh, some few days when he came up from Asotin, I went around to see him.

Q. What was your conversation with O'Keefe?

A. I told O'Keefe what Charley had said, and he says, 'Yes, that is right; I will loan you the money, and take your note for everything,' he says, 'your straight note for a year for the filing money, and the proving-up money, and the current expenses going up to see the timber, and also to pay my locator.' And I says, 'Do you think I can ever sell it?' and he says, 'Yes, you can sell it;' he says, 'in case you get tired of the deal I will give you \$150 over and above all expenses.'

The witness also testifies to his going to see the land, his filing his application and sworn statement, his being offered \$500 for his place in the line by a man by the name of Fitzgerald, a man whose name has been prominently connected with the prosecution in this case, as well as in other cases; and on page 1233 the witness testifies:

"Q. Why didn't you take this man's \$500, Mr. Prentice?

A. Well, I thought I could make more out of that.

Q. Wasn't it your understanding that you were to get \$150?

A. I knew I could get that, but I never promised that I would sell it for that.

Q. Didn't you feel under any obligation to Mr. O'Keefe?

A. No sir, I did not, because I had given my note.

Q. But you hadn't given any note then.

A. No, but I knew I had to. I was negotiating money from my brother in law in the East. My intention was to keep that claim for awhile at least."

On page 1239 the witness testifies to how he came to sell:

"A. I will tell you how that come along. I owed some money on my house, and the lumber company was crowding me for it, and they wanted me to go up there into the mountains, the Blue Mountains, and file on a homestead and stay there until I had lived there long enough to commute, and then sell the land to the Blue Mountain Company, you see, and they had offered me work there in the mill, and I didn't want to take my wife and children up there, and I thought possibly I could get the money from the East, and possibly hold this claim down for a while and sell it; and my brother was thinking of investing some money in the East and I wrote him and asked him if he could help me out, and I asked Jack, and I said, "Jack, now you told me I could get \$150 any time I wanted it, and I would like to get that much money, but I don't want to sell it.' And Jack says, 'All right, I think we can fix it up.' And he told me I could sign a bond for a deed, and that is what

I thought I did sign until Mr. O'Fallon and Mr. Goodwin convinced me I had signed a warranty deed."

On page 1248 the witness testifies on cross-examination that Mr. O'Keefe told him he would have a year, or until the maturity of the note in which to redeem the land, that the note ran out, and witness found he did not want to redeem it; that O'Keefe told the witness he would not record the deed until the witness found out whether or not he wanted to take up the claim.

"Q. What was your conversation with Jack regarding your sale of the land. That is, after you proved up and when you decided to sell it?"

A. Well, George, I never decided to sell it.

* * * *

"A. I told O'Keefe he had told me I could get \$150, and I said I would like to get it to pay off the lumber company for the lumber in my house, and I says, 'Is there any way I can get it from you without selling the place?' And he said, 'Yes, by giving me a bond for a deed,' and that is what I supposed I had signed.

Q. And you had no contract or agreement to sell it to him?

A. No sir, I did not; I knew I could get so much, but I never had told Jack I would sell it for that."

On page 1249 the witness identifies the affidavit he made and executed before George H. Rummens, a notary public. He states that the statements therein are true. This affidavit is marked "Defendant's

Exhibit J" and appears at page 4147 of the Record.

On page 1249 the witness states that the affidavit he made when he filed his sworn statement that he was taking the land for his own use and benefit, that he had no contract or agreement to sell the same was true.

FRED E. JUSTICE.

The next entry appearing in complainant's amended bill No. 388 is that of Fred E. Justice. There is no evidence to contradict the evidence of the witnesses in regard to this claim, nothing whatever to show that the entry was not made in good faith. Fred E. Justice is deceased and could not appear and testify, and we submit that an examination of the evidence will show that this entry should remain intact.

EDGAR H. DAMMARELL.

The next entry is that of Edgar H. Dammarell whose evidence appears at pages 1171 to 1201 of the record. On page 1171 the witness testifies as to the particulars of his taking up a timber claim, and who first spoke to him in regard to it:

“WITNESS: He said he was going to take up a timber claim and asked us (Mr. Prentice and I) if we thought that we would care to go up with them. I told him that in order to do so it would require some money, and that I didn’t have it, and he said he didn’t know but he thought perhaps his uncle would loan us the money.” (The witness referring to a conversation with Charles W. Taylor). “That was Jackson O’Keefe.”

* * * *

“Q. Well, at any other conversation with Mr. Taylor before you entered on the land, do you remember whether anything was said as to whether you would get a certain amount for your right or for your claim?

A. I am not sure about that conversation. Mr. Prentice and I have talked it over since, and Mr. Prentice and I don’t agree as to what was said at that time. Now, whether his memory is right or mine is I don’t know. I wouldn’t like to make a positive assertion as to that.

* * * *

Q. Now, what arrangements were made after the first talk with Mr. Taylor?

A. Well, we made a loan—we made a loan from Mr. O’Keefe on my note.

* * * *

Q. No, but there was some arrangement made before you went in. State what transpired after you first talk with Mr. Taylor—Mr. Charles W. Taylor.

A. Well, I don’t just remember how it lined up at that time, as to the date, but he made arrangements with Mr. O’Keefe to make the loan. in the event that he was satisfied with the timber, and we went in, and I think he made the loan after we came back, or just before we made

final proof; or rather not final proof—I guess you would call it final proof though.

* * * *

Q. Well, wasn't anything said at that time about the disposition of the land?

A. No, nothing said that I remember of. Of course, I knew that you couldn't dispose of the land until you had a receiver's receipt.

Q. There was nothing said whatever?

A. Nothing said whatever."

On page 1108 the witness testifies that after he returned from the timber, he learned that it was necessary for him to examine each and every legal subdivision, and he again made a trip to the timber for the purpose of more thoroughly examining the timber, and so that he could make a truthful statement that he had been upon each and every legal subdivision of the land.

The witness also testifies (p. 1182) relative to his getting money from O'Keefe for taking up an escrow agreement, and his dealings in regard to the land in question, also to the making out of his papers, his intention to apply to friends and relatives for the money with which to take up the note he had given O'Keefe and keep his land as a matter of investment, and on page 1193 the witness testifies:

"A. After thinking the matter over, and hearing so much about forest fires, I began to conclude—I came to the conclusion that if I didn't do so and if a forest fire ran through there it

would practically leave the claim valueless, and put me in a worse position than before; and I decided I would sell it.

Q. So you went to Mr. O'Keefe, or did he come to you?

A. I don't remember; I couldn't say for certain. We talked it over. We rode from Lewiston together in a buggy.

* * * *

Q. Now, what did he say about it? (meaning O'Keefe)?

A. Well(he said he believed it would be a good proposition to hold onto, and he said if I could make the raise it would be satisfactory to him.

Q. All that he wanted, you understood, was to get his money back?

A. Yes sir, I believe that was his idea."

On page 1119, the witness testifies on cross-examination:

"Q. As I understand, you had no contract or agreement to sell your land to Mr. O'Keefe or anyone else, at the time you filed your sworn statement, or at the time you made your final proof?

A. No sir."

The witness also testifies that the affidavit he made at the time he filed his sworn statement that he was taking the land for his own exclusive use and benefit and had no contract or agreement to sell it was true. The subsequent cross examination and re-direct examination of the witness strengthens the witness's statement that he had no understanding or agreement to sell the land prior to the time he made his final proof. The affidavit of witness is marked "Defendants' Exhibit I" appears at page

4143 of Record, and is in substance the same as the affidavit of Joseph H. Prentice, and heretofore referred to; and we call the Court's attention to the same.

EDGAR H. DAMMARELL.

The next entry appears to be that of Edgar H. Dammarell, which was included in this bill by error, as Dammarell only made one entry and acquired but one tract of land, so this entry must be disregarded.

On page 3335 the defendant William Dwyer testifies to his knowledge of the entries of Charles W. Taylor, Edgar J. Taylor, Jackson O'Keefe, Joseph H. Prentice, and Edgar H. Dammarell, and at the bottom of page 3335 states that he located them. And at the top of page 3336 the witness testifies:

"Q. And just state what connection you had with them.

A. Why, they came up there when I was in the woods. They came in with Jackson O'Keefe and if I remember right Jackson O'Keefe had spoken to me once before, some time before, about getting some claims for some boys, and they came up there and we had a general talk. I was around there a couple of days, went through the timber and through the woods there; it was in the fall of the year, I think about this time of the year, possibly about the middle of Octo-

ber, nice weather; and I told them what conditions the land was in, and if they were opened why there would possibly be a chance to get some of them, if they were not all scripped or taken by the State, and I was cruising some of the lands at that time.

Q. And did you hear the evidence of some of the witnesses relative to them paying you a location fee with a hundred dollar bill?

A. Yes.

Q. What are the facts about that?

A. Some of them might have given me a hundred dollar bill, but I think most of them paid me in gold, if I remember right.

Q. Now, when you borrowed money for an entryman to make final proof, what would you do in relation to their paying the location fee?

A. I would borrow the full amount to cover the whole thing.

Q. And you frequently turned the whole thing over to them, and they would pay you back the location fee?

A. Yes, that is what they would give their note for. For instance, if they wanted to borrow \$450.00, they would give their note for \$550.00. They would want \$450.00 to pay the land office and their expenses, and they would want \$100.00 to pay their location fee. They would make the note for \$550.00, and pay the land office, and pay me for my location fee, and still they would owe \$550.00. And the same way, they would give a mortgage later on for the full amount."

On page 3337, the witness testifies to his transaction with Charles Carey, to which we will refer later on.

On page 3238 the witness J. W. Bradbury testifies:

"Q. Mr. Badbury, Mr. Robnett testified to there being a hundred dollar bill in the till or cash drawer, or in with the cash at the teller's window, that was used by Mr. Dwyer, and for the payment of a location fee, and that it was kept in an envelope, and that it would be passed out to Mr. Dwyer and passed around to different men and would be returned to the bank and placed in the envelope and kept there. Was there ever such a hundred dollar bill kept in the bank in that way?

A. Not while I was working there.

Mr. Tannahill: Not while you was there?

A. No, sir.

Q. Do you have any recollection of a bill of large denomination being kept there in an envelope for any purpose?

A. Yes, sir.

Q. What was that?

A. A thousand dollar bill.

Q. And for what purpose was that kept?

A. Well, for my own purposes—for my own protection.

Q. And what was that?

A. Simply to keep me from paying it out for small bills. They are very unusual—thousand dollar bills."

The witness Kester testifies on page 3157 as to what he knows concerning the entries under consideration here: The witness states that he knows something concerning these various entries. He is then asked to state his connection with them, to which he replied:

"A. We purchased the claims of Bingham, Prentice, and Dammarell, and Charles W. Taylor and Edgar J. Taylor through Mr. O'Keefe.

Q. What conversation did you have with O'Keefe about it?

A. Well, after these men had proved up, O'Keefe came to me and wanted to know if I would buy those claims if the boys should conclude to sell them, and I told him that we would. But I remember another conversation with Mr. O'Keefe; I think it was before he went up into the timber. And he said that he had been talking with his nephews, I think, about going with him up into the timber, and that he had told them that he would like to take them in there and buy their claims. I told him that he couldn't make any such agreement with them, that that would be contrary to the law, and that he couldn't have any such agreement of that kind."

On the same page the witness states that he had no agreement for the purchase of these claims prior to final proof, either with the entrymen herein named or with Jackson O'Keefe, and on page 3158 states that *the negotiations began after they made final proof.*

This brings us to a consideration of Bill No. 407 and we call the Court's attention to the specific entries and the evidence in support of the same.

CLINTON E. PERKINS.

On pages 816 to 844 the witness testifies concerning the taking up of the Timber & Stone claim, and on page 819 he identifies his sworn statement and preliminary papers. On page 820 the witness relates a conversation which he had with Harvey J. Steffey concerning his taking the timber and stone claim.

“Q. What did he say to you about the claim when he told you that he had one that he could locate you on?

A. Why, he told me he had found me a claim.”

The witness had theretofore testified that he first went to Steffey and asked Steffey to locate him on a timber claim. The witness also testifies further:

“A. I didn't have the money at the time he found the claim, and he told me that he would pay the expenses and I could pay him back.

* * *

Q. Did he tell you what you could get out of it?

A. Why, he told me that he thought I could make a couple of hundred dollars over and above what it would cost.

* * *

A. Yes, he told me that it wasn't a good claim, but he was satisfied he could sell it for me and I could make that much.”

The witness also testifies on page 822 that he was to pay Mr. Steffey \$200 for locating him. On page 823 the witness testifies:

“Q. Now, tell exactly what Mr. Steffey informed you you would have to do to make that \$200.

A. Well, he told me that he was satisfied he could sell the land and I could get \$200 over and above my expenses. He said he positively could not make any bargain with me, but as far as he was concerned he was a friend of mine and he was satisfied he could get me that much money.

* * *

Q. Did he tell you just to rest easy in the matter and you would get rid of the land?

A. He told me he was satisfied he could sell it.

Q. And that was before you located?

A. Yes, sir.

Q. Did he bargain with you to give you that \$200?

A. No, sir.”

On page 827 the witness testifies:

“Q. Did you get the money from him (meaning Steffey) with which to make your proof?

A. No sir.

Q. Didn't you get any from him?

A. Not to make proof with I didn't.”

The witness further testifies that he borrowed \$400 from Steffey, but that he used his own money with which to make his final proof. On page 828 the witness testifies:

“Q. Did you give him a note for it?

A. No, sir.

THE SPECIAL EXAMINER: If you had any money of your own, why did you take Mr. Steffey's money?

WITNESS: Because part of that money I owed and I couldn't afford to have it tied up.

MR. GORDON: You didn't intend to use that money of yours to make proof, did you?

A. My own money?

Q. Yes, sir,

A. I certainly did.”

On page 834 the witness testifies on cross-examination as follows:

“Q. Mr. Perkins, as I understand you, your first conversation with Mr. Steffey was that you asked him if he could locate you on a timber claim.

A. Yes, sir.

Q. You told him you wanted to take up a timber claim?

A. Yes, sir.

Q. Then later he told you he could locate you on a timber claim?

A. Yes, sir.

* * *

Q. And he told you that he thought he could sell it for you so that it would bring you at least \$200 over and above expenses?

A. Yes, sir.

Q. And did he tell you in that same conversation that he could make no contract with you to purchase it or to sell it?

A. Yes sir, he did.

Q. And it was your understanding that you was making no contract with him regarding the sale of your land?

A. That was what I understood.

Q. Before you made your final proof?

A. Yes, sir.

Q. And as a matter of fact you made no contract for the sale of your land——

A. None whatever.

Q. ——until after you made final proof?

A. No, sir.

On page 835 the witness testifies that the affidavit he made at the time he filed his sworn statement that he was taking the land for his own exclusive use and benefit and had no contract or agreement to sell the land to anyone else was true.

On page 837 the witness identifies his affidavit he made about the time he made the sale of the land (Defendants' Exhibit "D," page 4124). On page 837 the witness testifies that the affidavit is true. This affidavit was executed at the request of Harvey J. Steffey. The evidence of this witness is in conflict with the evidence of Harvey J. Steffey in some instances, but taking the cross-examination of Steffey together with his admissions on direct examination, the Court will arrive at the conclusion that the witness has testified truthfully, and that neither the witness nor Harvey J. Steffey understood that any agreement existed for the sale of the land prior to

the time final proof was made. Then, if any such agreement did exist, it in no way or manner affects Kester and Kettenbach, for the reason that they were not parties to it. The evidence of William Dwyer that no such agreement ever existed, which is supported by the evidence of both Kester and Kettenbach, that if any understanding or agreement of any kind or nature ever existed between the entry-men, it was unknown to either Dwyer, Kester or Kettenbach.

We respectfully submit that the entry of Clinton E. Perkins should remain intact.

MARY E. LONEY.

The evidence of Mary E. Loney is found at pages 2717-2745. On page 2717 the witness testifies to her residence and her acquaintance with William Dwyer; her relationship to Effie A. Jolly and to Clinton E. Perkins. On page 2718 she testifies to filing her application to purchase a timber claim; to her conversations with Mr. Meyers regarding arrangements had with Mr. Steffey, which was in substance:

"Q. Yes, that Mr. Myers had with Mr. Steffey, relative to taking up his timber claim, with Mr. Mr. Myers?

A. Nothing particular, no. He just told me that he had taken a claim.

Q. And did he tell you that Mr. Steffey would furnish him the money with which to take a claim.

A. No, sir.

Q. Did you know that a few days before you had taken up a claim that Mr. Steffey had located Mrs. Jennie Myers on a claim, and she had filed?

A. I don't remember what time it was—how long it was before."

On page 2720 the witness testifies:

"Q. Now, how did you happen to go with him to look at the timber claim?

A. Why, I had sent him word that I wanted to take a claim.

Q. By whom did you send him word?

A. I sent him word by Mr. Myers."

On page 2721 the witness testifies:

"A. I don't know whether it was at that time or not; I think it was about that time, though, that he said he could get the money, but he didn't say where he could get it.

Q. And did he tell you what you would get out of your claim?

A. He told us about what we would get, yes.

Q. And that was while you were going to see the land?

A. I think it was; I am not sure. He said we would get between \$200 and \$250.

Q. And what were you to do with the claim to get that \$250?

A. He never said anything to do with it.

Q. You were not to keep it to make the \$250, were you?

A. No, sir, we didn't expect to.

Q. And what was your understanding as to whom you were to convey it to make that \$250?

A. I didn't know who was to get it.

Q. I know you didn't know who was to get it, but who did you understand was to get it?

A. I didn't know. Nobody ever told me, and I didn't know who was to get it.

Q. Well, who was to sell it for you?

A. I supposed Mr. Steffey was.

* * *

Q. Now, do you remember the first talk, or the talk that you had with Mr. Steffey, either the first time you talked with him about the timber claim, or the time you went to view the timber claim, as to whether or not anything was said as to whether an agreement could be made to sell the land?

A. He said that he couldn't make any agreement; I remember that, but I don't just—

Q. He said he couldn't make a proper agreement with you to purchase the land?

A. He said he couldn't make any agreement."

On page 2740 the witness testifies on cross-examination as follows:

"Q. Now, you say that he told you that you ought to be able to get from \$200 to \$250 out of it, over and above what it had cost you?

A. Yes, sir.

Q. And at one time you told him that you didn't have the money—money enough to pay your expenses of the taking up of the land, did you not?

A. Yes, sir.

Q. And it was your understanding that you were borrowing the money from him to pay these expenses, and to pay for the land, and that

you would pay him back as soon as the claim was sold?

A. Yes, sir.

Q. And he never asked you for a note, did he?

A. No, sir.

Q. If he had asked you to sign a note, you would have signed it, wouldn't you?

A. Yes, sir.

Q. Now, you also understand that Mr. Steffey was getting a location fee of \$200, did you not?

A. Yes, sir, I supposed he was.

Q. And you supposed that that was his interest in having you take up the claim.

A. Yes, sir.

Q. And his interest in furnishing you the money, so that he could make that \$200?

A. Yes, sir.

The witness also testifies on page 2741 as follows:

“Q. Now, do you remember that after you had made your proof, that Mr. Steffey told you that your claim was a little better claim than the others; that it was quite a bit better claim, and that you would get a little more than the others did?

A. He told me that mine was a little better than Mrs. Jolly's.

Q. Better than Mrs. Jolly's?

A. Yes, sir.

Q. And you did get more for your claim than Mrs. Jolly got for hers

A. A little more, I think, if I remember right.”

On page 2742 the witness testifies:

“Q. If you had had an opportunity to have sold it to someone else for \$500 more than you received for it, or was to receive, you would have

felt at liberty to have sold it to someone else, and paid Mr. Steffey the location fee, and paid him back his money that you had received from him, would you not?

A. Yes, sir.

Q. And you would not have felt that Mr. Steffey was under any obligations to purchase the land if he didn't want to, would you?

A. No, sir.

The witness also testifies on page 2742 that the affidavit she made at the time she filed her sworn statement that she was taking the land for her own exclusive use and benefit, and that she had no contract or agreement to convey the land was true. The witness also identifies her affidavit marked Defendants' Exhibit "V," appearing at p. 4158, signed Feb. 28, 1908, and states that the statements therein contained are true. This affidavit was signed at the request of Harvey J. Steffey. The evidence of the witness shows conclusively that there was no understanding or agreement for the sale of her land prior to the time final proof was made.

CHARLES E. LONEY

The witness Charles E. Loney testifies to the circumstances in relation to his entry, beginning at page 2745. The witness testifies that Steffey located him on the timber claim; that he was to get his expense money from Steffey; that Steffey said he

would furnish it; that the witness did not know at that time where he would get the money for his final proof. The witness also testifies on page 2747 that he had about \$150 of his own money with which to purchase the land; he testifies how he came to get the money from Steffel to pay his filing expenses, and that he procured it from Steffey, because he did not have the money to spare at the time. On page 2748 the witness testifies:

“Q. Before you went to view the land and before you went to the land office to file any papers, the first time, was anything said as to what you were to get out of your claim?

A. We was under the impression that we was to get somewhere between \$200 and \$250.

Q. Where did you get that impression?

A. Through talk with Steffey.

Q. What were you to do with your claim to get that \$200 or \$250?

A. We was to sell it.

Q. To whom?

A. I didn't know who these claims was to be turned over to; I didn't know whether he was the man that was going to get them or not, at the time.

* * *

Q. What was your understanding?

A. What was my understanding as to what I was to do with this land after I made my final proof?

Q. Yes.

A. There wasn't no understanding as to what I was to do with the land. There was

no agreement or bargain of any kind made. Of course, there was just a little talk, as I said, that I understood it that way; but as far as there was any bargain or agreement, there wasn't."

CROSS-EXAMINATION.

On page 2762 the witness testifies on cross-examination that he first talked with Mr. Steffey, told him that he would like to take a claim; that Steffey afterwards told the witness that he had a timber claim for him; that he told Steffey that he didn't have the money himself to make final proof; that he made his final proof and used part of the money he received from Steffey and part of his own money, \$150; and after the witness proved up he made a sale to Kester and Kettenbach; that he had no agreement with Mr. Steffey or anyone else for the sale of the land prior to the making of final proof; that the witness understood that Mr. Steffey would help him to find the buyer.

"Q. And if you had had an opportunity to sell that land for \$500 or any sum more than Mr. Steffey or his buyer was willing to pay for it, you would have felt at liberty to sell it and pay Mr. Steffey back the money you had borrowed?

A. Yes, sir; I was under no obligation to him to let him have that land.

Q. And you didn't understand that you was entering into any agreement to sell the land before you made final proof?

A. No, there was no agreement whatever."

The witness also testifies on page 2764 that the affidavit he made at the time he filed his sworn statement was true. He also identifies the affidavit he made before William J. Todd, a notary public, on the 21st day of December, 1906, and testifies that his statements therein made are true. This affidavit was signed at the request of Harvey J. Steffey also. The evidence of the witness is very clear that he had no understanding or agreement with Mr. Steffey or any one else for the purchase of the land prior to his making final proof. The witness did understand that Steffey would find a buyer and assist him in making a sale after final proof was made. It is only natural that the entryman should be interested in knowing whether or not he would be able to sell his land after final proof, and with this end in view, made such inquiries.

We respectfully submit that the evidence of the entryman himself shows that he had no understanding or agreement for the sale of his land prior to the time final proof was made, and that there was no fraud in connection with his entry. Even if there was, it is not shown that Kester or Kettenbach, the

purchasers, had any knowledge of the fraud. The entry of this witness should remain intact.

FRANK J. BONNEY.

The witness Frank J. Bonney testifies at pages 795 to 816 of the record. On page 797 the witness testifies to his taking up a timber claim and what induced him to take up the claim. "I thought I could make a little money out of it—a profit." The witness also testifies that when he first talked with anyone about taking up a timber claim, he had a couple or three hundred dollars in the bank; that Harvey J. Steffey located him; that he talked with him regarding the taking up of a claim before he went to view, the land, and testified as follows:

"A. I spoke to Mr. Steffey; I talked to him and asked him if he knew of any good claims, and I spoke to him a time or two.

Q. And what did he say?

A. I believe the first time I spoke to him he didn't know of any, and later he did and showed them to me."

At the bottom of page 800 the witness testifies:

"Q. Now, what was it that Steffey said to you?

A. Well, he told me that his claim wasn't very good, but he believed if I wanted to take it he could sell it for me for a couple of hundred

dollars, so that I could make that much profit on it.

Q. Did he tell you that he would guarantee you that you would make that much?

A. Well, sir, I couldn't say; I don't know as he did—I believe he did. I believe he told me that he was sure that he could get that much, and may be more.

Q. Were you to advance any of the money at all to take up that claim?

A. No sir, there wasn't nothing said about that, but I supposed that I was to put up the money."

The witness also testifies that he obtained a portion of the money from Steffey with which to make proof on his claim.

On page 805 the witness testifies:

"Q. Well, did you make your proof?

A. Yes, sir.

Q. And did you give them that money that Steffey gave you?

A. Well, sir, I had nearly enough money, and I used a little of that.

Q. You used a little of what?

A. Of the money that he handed me.

Q. How much of the money that he handed you?

A. I don't know how much—of—probably \$50.

Q. And what did you do with the rest of it?

A. Why, I hung on to it."

On page 806 the witness testifies in response to cross-examination by Mr. Gordon, who after being unable to compel the witness to answer as he wanted

him to—in other words—after the witness refused to testify falsely, for Mr. Gordon, the following proceedings were had:

“MR. GORDON: I will ask you the same question again: Didn’t Steffey tell you that if you would take up a timber claim that Steffey would pay all the expenses, if you would convey it to him, or whoever he told you to, and he would give you \$200 for it?

MR. TANNAHILL: We repeat the objection.

SPECIAL EXAMINER: Answer the question.

WITNESS: Why, Mr. Steffey never told me that.

MR. GORDON: Answer the question yes or no.

A. No, sir.

O. What did Steffey tell you?

A. He told me if I wanted to take a claim that he would guarantee me, or he was positive that he could sell it so I could make \$200.”

On page 813 the witness testifies on cross-examination as follows:

“BY MR. TANNAHILL: Q. Mr. Bonney, did you ever have any conversation with George H. Kester or William Dwyer or William F. Kettenbach regarding the sale of this land, before you made your final proof?

A. No, sir, I don’t believe I did.”

The witness also testifies that he made no contract to convey it to anybody, and that the affidavit he made at the time he filed his sworn statement was true. The witness also testifies that he made a little

more than \$200 out of his claim over and above expenses.

The witness identifies the affidavit which he signed about the time he transferred the land, and states that the same is true. The witness did not seem to understand the affidavit wherein it stated that he was not taking the same for the benefit of any other person. The witness understood that he was taking it for his own benefit and after the affidavit was understood by the witness he stated that it was true. The affidavit appears at page 4122, and is Defendants' Exhibit "C."

At the bottom of page 815 the witness testifies:

"Q. At whose request did you sign this affidavit?

A. At Mr. Steffey's."

We respectfully submit that there is no sufficient showing of fraud in connection with the entry of Frank J. Bonney that will justify the Court in setting it aside. William Dwyer and the defendants William F. Kettenbach and George H. Kester each testified that they knew nothing of any agreement between Steffey and the witnesses if any such agreement did exist, they were not a party to it.

JAMES T. JOLLY.

The witness James T. Jolly testifies on pages 2656 to 2689 of the record. On page 2656 the witness testifies to his residence, business, and occupation, his acquaintance with Harvey J. Steffey; his acquaintance with Charles Myers; his taking up a timber claim; that Harvey J. Steffey located him on a timber claim; that he was to get the money from Mr. Steffey with which to purchase the land; and on page 2661 the witness testifies that he was to pay Mr. Steffey a location fee of \$200, and the witness also testifies:

“Q. What was your understanding as to what you were to get?

A. Well, there was no price understood.

Q. Well, about how much then?

A. Why, I expected to get in the neighborhood of \$300 out of it.

Q. From whom did you expect to get that?

A. Through Mr. Steffey—from him.

Q. And was anything ever said as to paying any fee for Mr. Steffey locating you on this land?

A. Yes, sir; I was to pay him a fee.

Q. How much were you to pay him?

A. \$200.”

In the subsequent pages the witness testifies to going to view the land, his appearing at Lewiston for the purpose of filing his application, his making final proof, procuring the money therefor, and his

subsequent sale of the land and receiving between \$200 and \$250 over and above all his expenses.

On page 2674 the witness testifies on cross-examination that the witness first asked Mr. Steffey to locate him on a timber claim; that Mr. Steffey subsequently sent word to him that he had a timber claim upon which he could locate him. On page 2677 the witness testifies that Steffey never told him what he could get out of the land.

“Q. Then there was no conversation between you as to what you could get out of it?

A. Not any.

Q. I see. And you had no understanding regarding that?

A. No, sir.”

On page 2678 the witness testifies that he arrived at the conclusion that he could get from \$200 to \$250 out of the land over and above expenses from the witness knowledge of timber after having examined the same; that he did not arrive at that conclusion from any statement made to him by Mr. Steffey; that Mr. Steffey loaned the witness the money to pay the purchase price. On page 2681 the witness testifies that he thinks Mr. Dwyer handed him the deed to sign just a little piece from the witness' home. On page 2682 the witness qualifies such statement and states:

"A. I think Mr. Dwyer is the man who handed me the paper.

Q. To refresh your memory, I will ask you, Mr. Jolly, if you don't remember that he (meaning Mr. Steffey) told you that you would have to send the deeds down to Lewiston and put them in escrow until the abstracts were procured and the abstracts examined, and the title was found to be all right before you could get your money?

A. Oh, yes, he told me that, but I am pretty positive that Mr. Dwyer gave me the money (meaning deed), although I may be mistaken. I find that I have been mistaken on several points.

* * *

A. Well, I wouldn't contradict him on it: I possibly may be mistaken in the one. But I remember distinctly where I received it."

On page 2683 the witness states that he remembered the price arrived at and agreed on was \$850, which included the money which Mr. Steffey had loaned and the \$200 location fee.

At the bottom of page 2683 the witness testifies:

"Q. Then you had no agreement for the sale of your land until after you had made your final proof?

A. None whatever."

The witness also testifies that the affidavit made at the time he filed his sworn statement was true. The witness also identified Defendants' Exhibit "Z," which is in substance the same as the defendants' Exhibit "D" found at page 1160 of the record,

and states that the affidavit is true. This affidavit was signed at the instance of Harvey J. Steffey.

EFFIE A. JOLLY.

The evidence of Effie A. Jolly is in substance the same as the evidence of her husband James T. Jolly, and is found on pages 2689-2717 of the record, to which we call the Courts' attention, and especially to the cross-examination of the witness Effie A. Jolly. The evidence is insufficient to show or establish fraud in relation to these two particular entries, and certainly insufficient to show that the defendants, or either thereof, was a party to the fraud, if any did exist, or had any knowledge of the same. The entry should be held intact.

CHARLES S. MYERS.

The evidence of Charles S. Myers is found at pages 602 to 620 of the record. On page 602 the witness testifies to his residence, business or occupation, and at page 603 testifies to his taking up a timber claim, and what induced him to take up a timber claim. On page 604 the witness testifies:

"A. Why—well, I hardly know how—in the first place there was other people taking up

claims there and I was acquainted with this man Steffey, and he was locating, and I told him I wouldn't mind taking up a claim myself.

Q. That was Harvey J. Steffey, was it?

A. Harvey J. Steffey, yes sir."

On page 605 the witness testifies:

"A. He told me he could get me a claim; as near as I can remember now he said it wasn't a very good claim, but he said I could make \$150 out of it anyway.

Q. What was your understanding as to what you were to do to make this \$100 that you speak of?

A. The \$100 or \$150 do you mean?

Q. The \$150.

A. Why, I supposed that if I wanted to I could sell the claim then and get the money out of it.

Q. And was that your understanding as to what you were to do with it?

A. I understood that I could sell it, yes. He just told me I could make \$150, and of course I knew there was timber claims changing hands."

The witness testifies that he borrowed the money from Steffey with which to pay his expenses, and also to pay the purchase price of the land. The witness also testifies to going upon the land, examining the same, to his making final proof, and to his selling the land. On cross-examination, at page 616, the witness testifies:

"Q. Mr. Myers, your transactions with Mr. Steffey were simply that if you wanted to bor-

row the money, or didn't have the money yourself with which to pay for the land, he would loan you the money?

A. That was the understanding, yes.

Q. You had no contract or agreement to sell him the land at the time you made your filing, did you?

A. I had not.

Q. Or at the time you made your final proof?

A. No, sir.

Q. You had no contract or agreement that you was to sell the land to anyone at the time you made your filing, did you?

A. I did not.

Q. And had some one else offered you \$500 more than Mr. Steffey had offered you, and Mr. Steffey wouldn't give that amount, you would have felt perfectly free to sell it to the other party, would you?

A. I would have by putting up the money he loaned me."

The witness also testifies on page 617 that the affidavit he made at the time he filed his sworn statement was true. The witness also identifies the affidavit he made about the time he transferred the land, which affidavit was introduced in evidence and marked Defendants' Exhibit "A," which affidavit the witness states is true. The affidavit appears at page 4121 of the record and was executed at the request of Harvey J. Steffey.

The evidence is insufficient to show any fraud in connection with this entry, or that there was any contract or agreement with Mr. Steffey or anyone

else for the purchase of this land. There was no understanding or agreement between the witness and Kester, Kettenbach or Dwyer. If any agreement or understanding did exist between Steffey and the witness, the defendants Kester, Kettenbach or Dwyer had no knowledge of it. This entry should therefore remain intact.

JANIE MYERS.

The evidence of the witness Janie Myers appears at pages 620 to 636 of the Record and is in substance the same as the evidence of the witness Charles S. Myers. She testifies, however, that she had no contract or agreement with anyone for the sale of her land prior to final proof. On page 633 the witness testifies as follows:

“Q. You had no arrangements with Mr. Steffey that you would sell him the claim, or sell the claim to anyone, before you filed on it, did you?

A. No, sir.

Q. And you had no such arrangements before you made your final proof?

A. No, sir.

O. And you didn't understand that you was under obligations to sell the claim to Mr. Steffey or to anyone else, at the time you filed on it, or at the time you made your final proof?

A. No sir.”

On pages 633 and 634 the witness testifies that the affidavit she made at the time she filed her sworn statement was true. She also identifies the affidavit she executed about the time she transferred the land, and on page 635 states that the affidavit is true. This affidavit was executed at the request of Harvey J. Steffey. We respectfully submit that the evidence is insufficient to show fraud in connection with this entry, and that the entry should remain intact.

We have now reviewed briefly the evidence of the witnesses in relation to these particular entries, and have observed that all of the witnesses testified that it was their understanding that no contract or agreement existed for the purchase and sale of the land; that they borrowed the money from Mr. Steffey with which to make final proof; that they never at any time had any discussion with either Kester, Kettenbach or Dwyer regarding it, and insofar as the entrymen knew, Kester, Kettenbach nor Dwyer knew anything about any arrangements they had with Mr. Steffey for the loan of any money or for the sale of the land. We then have the unsupported evidence of Harvey J. Steffey that he had told William Dwyer the circumstances surrounding these entries, and his arrangements had with the entrymen for the

purchase of the land. These statements are denied by Mr. Dwyer, and it will be observed that Mr. Steffey is in conflict with each and all of the entrymen as well as in conflict with Mr. Dwyer. There is such a wide variance between their evidence that it cannot be reconciled. Either Mr. Steffey or all of these entrymen and Mr. Dwyer must have testified falsely. Mr. Steffey testifies that he had some conversation with William F. Kettenbach relative to obtaining the money for some of these entrymen to make their final proof. That Kettenbach did arrange for the money. It is significant that this money was obtained by Mr. Steffey from the bank by Steffey drawing his check on his account for the same. None of it was furnished by either Kester, Kettenbach, or Dwyer. When the lands were finally purchased, the money was paid and the matter was closed, the same as any other ordinary transaction wherein lands were being purchased.

On pages 1825 and 1826 Mr. Steffey testifies on cross-examination to Mr. Dwyer going with him and looking over the land. He testified on direct examination that Mr. Dwyer went and looked over the land prior to the time the entrymen had filed on the same; and Mr. Steffey testifies further as follows:

“Q. Dwyer told you that he would give them \$200 over and above expenses?

A. Yes, sir.

Q. Had Dwyer gone and looked at the claims?

A. Some of them he did.

Q. What claims did he go to look at?

A. He went to look at Mrs. Loney's and Mrs. Jolly's claims.

Q. Did he know that Mrs. Loney and Mrs. Jolly were going to take those claims?

A. *I think they had already taken them when he looked at them.*

Q. *Hadn't they already filed on them?*

A. Yes, sir.

Q. *Hadn't they made their final proof, too.*

A. *I don't think they had.*

Q. To refresh your recollection, wasn't it after they made final proof and just before they made the deeds that Mr. Dwyer went up and looked at them?

A. *Possibly, but I don't recollect it.*

Q. *That may have been the case?*

A. *It may have been."*

It will be observed that this admission of Mr. Steffey is in support of the evidence given by Mr. Dwyer; that after these entrymen had made their final proof and Steffey came to Kester and Kettenbach with the proposition of selling them the land, that he, Dwyer, went and looked the lands over and reported that some of the claims were fair claims and others were not worth purchasing; that Steffey finally went to Kester and told Kester that some of the claims were extra good ones, and others poor,

but they would average up well, and Kester finally bought them against the report of Mr. Dwyer.

The witness further testifies on page 1826 as follows:

“Q. Didn’t you go down and see Kester about it, and explain to Kester that some of them were poor claims and others were good ones and he had better take them?

A. No, I never told Kester that.

Q. Didn’t you tell Dwyer that?

A. No, I don’t think I did.

Q. You may have told him that some of them were not very good but that others were good and they would average up all right?

A. Possibly I may have told him that; very likely I did.

Q. And in that way he concluded to take the claims?

A. I don’t know what he concluded to do.

Q. But he did finally take them.

A. He took them.

Q. What did he pay you for them?

A. He didn’t pay me anything for them.

Q. What did he pay for the claims?

A. He paid these people \$200; they all got \$200.

Q. You had already paid that according to your testimony.

A. No, I hadn’t already paid that.

Q. Well, it was charged up to your account, wasn’t it?

A. Well, I don’t know whether it was or not.

Q. *You had given your checks for it.*

A. *Yes.*

Q. And they were paid, the checks were paid, and they were returned to you charging the

same as other checks you drew on the bank, were they not?

A. Yes, sir.

Q. Then they must have been charged up to your account, were they not?

A. Well, this money wasn't paid finally until the lands were deeded over to Kester and Kettenbach.

Q. Well, you drew the money, didn't you?

A. I did.

Q. On your checks?

A. Yes, sir.

Q. And passed it over to these entrymen, is that right?

A. The entrymen got their \$200.

Q. Well, now then, how did you get your money back, how was your settlement made?

A. I didn't get any money back.

Q. How was your settlement made?

A. The settlement was made when the—I don't know how they did make the settlement; I never paid any attention to my checks afterwards. I supposed they straightened those things out themselves.

Q. Well, you got your checks back, didn't you?

A. Yes.

Q. When did you first begin to pay some attention to your checks?

A. Well, I always paid attention to my checks.

Q. You always paid attention to your bank account?

A. Usually, yes.

Q. And you was depositing money and checking it out?

A. When I had money.

Q. And you frequently overdrew at the bank, did you not?

A. Yes, sir.

Q. And frequently borrowed money from the bank?

A. Occasionally, yes.

Q. Now then, the account was checked on for this money just the same as any other check you drew on the bank, was it not?

A. Yes, sir.

Q. Didn't you pay some attention to your bank account? How it stood, and how this settlement was made?

A. Every once in awhile I would get a statement, yes.

Q. Then you paid some attention, did you not, when you got the statement?

A. Oh, yes."

On pages 1830 to 1832 it will be observed that the witness is squarely in conflict with the evidence of James T. Jolly and Clinton E. Perkins, and on page 1831 the witness testifies:

"Q. I am asking you what you said. Didn't you tell Perkins that you couldn't make any agreement to buy the claims at that time, or sell it for him at that time?

A. I don't think I did.

Q. Will you swear that you didn't?

A. To the best of my knowledge I will, yes.

Q. You know whether you did or not?

A. Well, not exactly.

Q. Well, did you have any such conversation as that with him at all?

A. I don't think I did.

Q. You never told him you couldn't make an agreement with him?

A. Well, yes, I may have told him I couldn't make an agreement with him, but there was no such language used as 'sell the claim.'

Q. But you did tell him you couldn't make an agreement with him?

A. I think I did.

Q. You tried to make him understand that?

A. Yes, sir.

Q. That you couldn't have an agreement with him?

A. Yes, sir.

Q. And you so understood, didn't you?

A. Well, no, I didn't understand that.

Q. Do you mean to say that you was trying to lead Mr. Perkins into committing perjury and not knowing it?

A. Well, no, I didn't want him to commit perjury.

Q. You didn't want him to commit perjury?

A. No.

Q. Then the arrangements you made with Mr. Perkins was such that you made him understand that it didn't amount to an arrangement. Is that right?

A. Well, he understood it as well as I did. I don't know what I made him understand, but he understood it as well as I did.

Q. He understood that he didn't have any agreement as well as you did, didn't he?

A. Well, I don't know what he understood.

Q. But you remember that you did tell him you didn't have an arrangement; is that right?

A. Yes, sir.

Q. And you also had him sign an affidavit, Defendant's Exhibit 'D', for identification, as follows (P. 1833 Record):

State of Idaho,
County of Nez Perce, ss.

CLINTON E. PERKINS, being duly sworn, deposes and says: That he is the identical party who made entry of the lands hereinafter described under the Stone and Timber Act providing for such entry. That at no time prior to the entry or prior to the final proof did the affiant have any agreement or understanding, expressed or implied, that said entry was being made or said title being acquired for the benefit or advantage, directly or indirectly, of any person, company, or corporation. That said entry was made, and said title acquired, solely for the exclusive use and benefit of the affiant. That prior to the entry affiant had made personal examination of said land and here makes oath that to the best of his belief the same did not and does not contain any valuable deposit of gold, silver, cinnabar, copper or coal and was not mineral land under the terms of said act. That the sale now being negotiated is not the result nor made in pursuance of any agreement or understanding, expressed or implied, had at any time prior to final proof upon the hereinbelow described lands, and that the said purchaser is in no wise interested nor in any way had any interest in or to said lands, or the title thereto, directly or indirectly, prior to the negotiations for the present sale, and that such negotiations were commenced subsequent to the final proof and the acquisition of title by this affiant from the government. That the lands referred to are described as follows, to-wit: Lots number three and four, Section three, Township 36, North Range 5 East, Boise Meridian: the south half

of the southwest quarter of Section 34, Township 37 North, Range 5 East, Boise Meridian.

CLINTON E. PERKINS.

Subscribed and sworn to before me this 28th day of February, A. D., 1907,

WILLIAM J. TODD,

Notary Public in and for Nez

(Notarial Seal)

Perce County, Idaho.

Q. You had him sign that affidavit, did you?

A. I think so.

Q. Is that affidavit true?

A. As far as it went I guess it is, if he signed it.

Q. You say the affidavit is true, do you?

A. That he signed it; yes.

Q. Yes, he signed the affidavit and swore to it. You can examine it if you like (Handing paper to witness)."

It will be observed that Mr. Steffey is highly prejudiced against the defendants, that he is willing to commit perjury himself and subornation of perjury in order to injure the defendants in some way. It is not clear from the evidence just what the trouble was, or what brought it about; but Steffey has some sort of an imagination that he was not treated fairly, or that he should have received something to which he was not justly entitled, or for some reason he desires to cheat, wrong, defraud and injure the defendants. He apparently would be willing to serve a term in the penitentiary if he could succeed in causing the defendants to serve a term there. He

admits that he testified falsely when he appeared as a witness for these various entrymen, and we call the Court's attention to his evidence at page 1839 to 1841 of the record where the witness states that he told the witness Bonney that he had no agreement with him, and also where the witness testified in the next paragraph or on the same page that he swore falsely when he appeared as a witness for the entryman at the land office, and where he admits on pages 1841, 1842 and 1843 and succeeding pages that he swore falsely; one of the questions being as follows:

"Q. And you signed the testimony of the witness Harvey J. Steffey, plaintiff's Exhibit 11, did you? That is your signature, is it?

A. That is my signature, yes.

Q. Do you remember testifying as follows: 'Do you know whether the applicant has directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title which he may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except himself,' to which you answered: 'No.' You so answered, did you?

A. Yes, sir.

Q. Was that answer true or false?

A. It was false.

Q. You knew it was false at the time, did you?

A. Yes sir."

Question 11 is to the same effect, as well as succeeding questions. It seems that it would be most unjust to take the evidence of a witness who admits that he deliberately went before an officer authorized to administer oaths and swore falsely at one time, and weigh his evidence against the evidence of several highly respected citizens of the state, whose evidence is consistent with the truth and who are supported by the facts, circumstances and documentary evidence, which supports and sustains their testimony, and which squarely contradict the testimony of the witness Harvey J. Steffey. We believe that the Court will not weigh the evidence of Harvey J. Steffey against that of all the entrymen, and the entry women, especially in view of the fact that Harvey J. Steffey admits that he committed perjury, that he suborned perjury, and that he appears as a witness willingly and testifies against the defendants for the express purpose of injuring the defendants and in an effort to deprive them of their land,

In connection with these entries we call the Court's attention to the evidence of George H. Kester, found on pages 3171 to 3173 of the record. On page 3171 the witness Kester states that he and the defendant Kettenbach purchased the land.

“Q. Will you state fully all that you know about it, and what connection you had with it?

A. Well, about all I know about this transaction is that we bought several claims there from Mr. Steffey, on the information of Mr. Dwyer as to the value of the land; that is, there were part of them that we bought on estimates that Mr. Dwyer O.K.'d, and there were some that we bought without his O.K.

Q. Do you remember what ones were bought without Mr. Dwyer's O.K.?

A. I believe it was Mrs. Bonney and Mrs. Jolly, if I remember correctly.

Q. Do you remember whether it was Mrs. Loney or Mrs. Bonney?

A. Or Mrs. Loney, I guess; perhaps that is it.”

On page 3172 the witness testifies:

“Q. Now, I will ask you to state whether or not you had any notice or knowledge of any understanding or agreement that Mr. Steffey had with these entrymen, before they filed or before they made their final proof?

A. No sir.

Q. When was the negotiations begun for the purchase of these lands, in relation to the time when they made final proof?

A. After they made final proof, in every case.

Q. After they made final proof?

A. Yes sir.

Q. Do you remember the first thing that was brought to your notice or knowledge or attention concerning the purchase of these lands?

A. Well, as to the particular land, only when they were ready for sale, after they had made their final proof.

Q. Have you read the evidence of Mr. Steffey that he gave when he was upon the stand?

A. Yes.

Q. Did you read his evidence wherein he testified that he had a conversation with Mr. Dwyer, in your presence, before the entrymen filed on their lands, concerning the sale of these lands to you, and that he told you that one of the claims was better than the Dell Maris claim and that either you or Mr. Dwyer said if it was you would have a champagne supper, or words to that effect?

A. I believe that something of that kind occurred, but that was at the time of the purchase of the Clint Perkins claim, as I remember it—at the time that claim was purchased; and that was his reasons for the consideration, as I remember, in that deed at that time.

Q. And was the deed executed at that time?

A. Yes, sir.

Q. And it was after the final proof had been made on all of the claims?

A. Well, I think that occurred at the time of the closing up of that Clint. Perkins deal.

Q. I see that you included a consideration of \$1,250 in the Clint. Perkins deed. I will ask if you remember what you gave for that claim, whether or not the consideration mentioned in the deeds are the exact consideration?

A. Yes, sir.

Q. \$1,250, is that what you paid Mr. Steffey for it?

A. \$1,250, yes sir, was paid for this claim.'

The witness testifies concerning the James T. Jolly claim for which was paid \$850 and Effie A. Jolly claim, for which was paid \$900.00; that \$950

was paid for the Mary A. Loney claim, and that \$1000.00 was paid for the Charles E. Loney claim. The Charles S. Meyers claim \$1000.00, Janie Meyers \$450.00 for 80 acres; Frank J. Bonney \$950.00.

We now call the Court's attention to the evidence of William Dwyer in relation to these particular entries, and especially to page 3341, wherein he stated that he heard the evidence of H. J. Steffey in relation to the particular claims; that he knows the entrymen and entrywomen Charles E. Loney, Mary A. Loney, Frank J. Bonney, James T. Jolly, Effie A. Jolly, Charles S. Myers, Janie Myers, and Clinton E. Perkins, and that Steffey located them upon these timber claims.

(Page 3342).

A. Why, yes, I remember him saying something about it to me once.

Q. What did he say?

A. He said he had located them.

Q. He had located them?

A. Yes sir.

Q. What was the next thing?

A. I said, 'How much timber is there on them?' 'Oh,' he says, 'they are pretty well covered with timber.' I says, 'No, they aint' they can't be.' I says, 'They lay right within a couple of miles of Pierce, and that land has been cruised and cruised and re-cruised by the Potlatch Lumber Company, by the Wisconsin Log & Lumber Company, and by the Western Lumber Company, and by everybody.' and I says 'that

aint good timber land.' 'Well' he says, 'it is pretty good average.' And I says, 'Well, I know it aint. I'll tell you what you might have done with that land; If you could have located the best forties and scripped it you could probably have got out whole on it.' 'Well' he says, 'you might go and look at it. Those are all friends of mine, and I told them I would locate them.'

Q. Now, was that before or after they had made final proof?

A. Why, I think it was about the time they made final proof.

Q. About the time they made final proof?

A. Yes sir. There was some of those claims, now, later on—there was two of those claims that was up on the road, and we had quite an argument about them claims. I just absolutely refused to buy them at all. I says, "Any man that would go to work and locate such timber lands as those, and then try to sell them." 'Well,' he says, 'I went good for them people,' he says, 'I loaned them the money.' And he says, 'I am going to sell them.' I said, 'All right; you cant sell them wtih my estimate, because I aint going to O. K. any estimate on them lands.'

Q. And then what happened?

A. Well, he sold them to Kester.

Q. And—

A. And we had some trouble, too, also, about the Perkins claim. Mr. Kester said I O.K.'d them, but I really didn't O. K. He bought that, too. That was that claim he paid \$1250 for. He said it was as good as the Dell Maris claim. Well, I knew it wasn't. I just wanted to correct that mistake. I didn't O. K. that claim.

Q. Did you hear Steffey's statement where in he said he had a conversation with you in the presence of Kester before these entrymen filed,

that one of these claims was as good as the Dell Maris claim, and that you said if it was you would have a champagne supper, or words to that effect?

A. Yes, sir.

Q. Now, what was there about that?

A. Oh, no, that wasn't—that was the day that he sold that claim.

A. That he sold the Perkins claim?

A. Yes.

Q. After they had made their final proof?

A. Yes, after they had made their final proof.

Q. And did you have any understanding or agreement with Steffey for the purchase of these claims, before the etnrymen made final proof?

A. No sir, I didn't.

Q. Now, did you ever at any time enter into a conspiracy, combination or understanding with Kester and Kettenbach, or anyone else, that you would defraud the United States out of any timber lands, or anything else?

A. No, sir.

Q. And have you ever had any connection with Kester and Kettenbach in the acquisition of timber lands, further than working for them for a salary, or for wages, or for a commission?

A. That's all, the same as other people that I have worked for.

Q. Did you hear the evidence of H. J. Steffey wherein he stated that you used an expression of 'up-the-creeking-them' when you located them on timber land without taking them to the land?

A. Yes sir.

Q. What is there about that, if anything?

A. I never heard it before. I guess he heard that up Priest River.

Q. Did you ever locate anyone on a tract of timber land without taking them upon the land?

A. No sir, I never did. Or on a poor one, either. If I didn't have a good one I didn't locate them at all."

Here the witness testifies concerning his sending Steffey out to locate Margaret Goldsmith and Blake-man on timber land; that he procured the necessary horses, and Steffey was directed to take them to the land; that the witness never knew that Steffey had not taken them to the land until some time afterwards, and at the bottom of page 3345 and top of page 3346 the witness testifies:

"A. Why, I was up there on the fire patrol, watching the fire, and Steffey came in there one day and he was awfully excited, and he said that there was a fellow by the name of Hinds from Kendrick, had come down here and protested Mrs. Andrews' claim, or in regard to their being on the claim, and he said that they had J. B. Anderson and Miles Johnson, and he says, 'They are all around there,' and he says, 'I am afraid they will indict me.' I says, 'What did you do to be indicted for?' 'Well,' he says, 'I didn't show them on the land.' I says, 'Why didn't you?' 'Oh,' he says, 'we never did.' He says, 'Jack Maloney and I, we never showed anybody land that we located them on.' I says, 'Do you mean to tell me you didn't show Mrs. Goldsmith and Blakeman that land?' He looked about a minute, and he says, 'By God, Bill, I didn't. I never told you before, but you ought to have known it by the length of time it took me.' 'Well,' I says, 'you are certainly a daisy, to swear to a lie, when that land is right on the

road.' And that is the first I knew that they hadn't been on the land.

Q. Did you ever have anything to do with locating Jane Andrews?

A. No.

Q. Or selling the relinquishment?

A. No.

Q. Or the purchase of the land?

A. No, I didn't."

BILL IN EQUITY No. 406

The charges in this bill involve the land of the various entrymen upon which final proof was made, and most all of which has subsequently been transferred to the defendants, or some of them, and by the defendants transferred to other purchasers.

We will briefly call the Court's attention to the evidence bearing upon the land of each individual entryman, and will refer to the same by the name of the entryman. A full description of the land, and the names of the various entrymen, will be found at pages 4249 to 4261 of the record.

WILLIAM B. BENTON.

The name of the first entryman is that of William B. Benton, appearing in bill of equity No. 406. The land embraced in his entry is set out and specifically

described at page 4249 of the record. This land was subsequently transferred to the Clearwater Timber Company.

The only evidence in support of the bill applied to this entry is the unsupported evidence of Clarence W. Robnett, which is contradicted by the evidence of the entryman, which will be found at page 3517 of the record. We do not feel called upon to set out and copy the evidence of the entryman W. B. Benton, but respectfully ask the Court to read the same in its consideration of the case.

JOEL H. BENTON.

The evidence in relation to the land embraced in the entry of Joel H. Benton is substantially the same as that in relation to the entry of William B. Benton. Robnett is in conflict with the evidence of the entryman, Joel H. Benton, and his is practically all the evidence relied upon by the Government in its attack upon this entry.

The direct examination of Joel H. Benton is found at pages 636 to 671 of the record.

On page 638 of the transcript appears the evidence relative to an understanding between the entryman and Clarence W. Robnett concerning the taking

up of a homestead. The evidence of the witness, found at page 637, is as follows:

Q. Had you located a homestead prior to that time?

A. I had started to take up one, yes, sir; gone onto one, but never filed on it.

* * * *

Q. What was that arrangement?

A. Well, it was that he should—I would take that up and go on to the land and stay there until it was surveyed, and he was to furnish the money for the expenses while I was there. And then after final proof I was to let him have the land.

Q. Where was this homestead you refer to?

A. In 39-4.

On page 637 the witness also testified concerning his taking up a timber claim under the Timber & Stone Act:

A. Why, I don't know; everybody was talking about it, the whole town, I don't know. W.

A. Smith located me; I think I spoke to him myself."

The witness on page 641 also testifies concerning his taking up a timber claim:

Q. Did you have any conversation with Robnett then about taking up a timber claim?

A. It was very slight. Mr. Smith came in at the same time and—

Q. I am speaking now about Mr. Robnett.

A. I was going to tell you; Mr. Smith came in at the same time, and we all talked together, and Mr. Robnett mentioned, if Al. could find

me anything to locate me on he would see me through. That is as far as I remember.

Q. Was that the only conversation you had with him about it?

A. Yes, sir.

Q. Was he to furnish you money the same as for the homestead?

A. No, sir; there wasn't a word said about him furnishing me the money; wasn't a word said.

Q. Do I understand you that you didn't take up a timber and stone claim at the request of Mr. Robnett?

A. No, sir; I did not.

* * * *

Q. Did he tell you he would furnish you the money?

A. No, sir; he didn't say that at all.

On page 665 of the record the witness testifies, on cross-examination, as follows:

Q. Mr. Benton, did you ever have any contract, agreement, or understanding in regard to the sale of this land or the conveying of it prior to the time you filed your sworn statement and prior to the time you made your final proof, with William F. Kettenbach, George H. Kester or William Dwyer?

A. No, sir.

Q. And as I understand you, you had no agreement for the sale of your timber claim prior to the time you filed your sworn statement and prior to the time you made your final proof with anyone?

A. No, in fact there was nothing said about it at all.

On page 667 the witness testifies that he had made no contract or agreement to convey the land to anyone prior to the time of filing his sworn statement, and prior to the time he made his final proof.

On page 667 of the record the witness testifies:

Q. I will ask you, Mr. Benton, if during the talk with Mr. Robnett, if he said anything to you about not letting Mr. Kettenbach or Mr. Kester know of his purchasing the land, or of his arrangements with you?

A. He told me several times he had no connection with them whatever. that he had nothing to do with them at all. It was on his own account. * * *

Q. And what was his actions in regard to them not knowing what he was doing in regard to the land? State whether or not he tried to keep that from them, or talked with them where they could hear you?

A. He did; he tried to keep it secret.

Q. He tried to keep it from them?

A. Yes, sir: he took me out in the Directors' room and he did not want anybody to hear what he was doing.

The evidence of this witness is important as bearing upon the actions of Robnett, and is in contrast with the evidence which he has given upon the stand, that Kester and Kettenbach knew of his relations with the various entrymen and knew of the circumstances under which he acquired title to the land. The evidence is material also in that it impeaches the evidence given by Robnett. The witness was pro-

duced by the Government, and they are bound by what he says.

GEORGE W. HARRINGTON

There is no evidence in support of the charges against this entry, and, even if there was, it has long since been conveyed to the Western Land Company, and there is no evidence of any kind or nature that this Company had any knowledge of any irregularity in acquiring the title.

VAN V. ROBERTSON.

The evidence of Van V. Robertson in support of this entry is found at pages 774 to 795 of the record; his cross-examination at 792 to 795. The evidence of this witness shows conclusively that there was no fraud in connection with this entry, and the land has long since been transferred to the Lewiston National Bank.

On page 792 the witness testifies, on cross-examination, as follows:

Q. As I understand you, Mr. Robertson, you had no agreement with Mr. Robnett, or anyone else, to sell him the land?

A. No, sir.

Q. Prior to filing your sworn statement?

A. No, sir.

Q. And you had no such agreement at the time you made your final proof?

A. No, nor no time afterwards.

On page 793 of the record the witness states that the affidavit he made at the time of filing his sworn statement was true.

JOHN W. KILLINGER

The evidence in relation to this entry is very meager, and wholly insufficient to sustain the charges of fraud or even of irregularity in the matter of acquiring title to the land. Then, it has long since been transferred to George E. Thompson, who is an innocent purchaser for value, and without notice.

JOHN E. NELSON

The evidence of John E. Nelson appears at pages 1038 to 1057 of the record. The evidence is insufficient to show any fraud or irregularity in relation to his acquiring title to this tract of land. Then, if the evidence was sufficient, the land has long since been transferred to Elizabeth Thatcher, who was an innocent purchaser, for value, and without notice.

On page 1040 of the record, the witness testifies:

Q. And did you make any arrangements with him (Robnett) about the claim?

A. Absolutely none.

On pages 1055 and 1056 the witness testifies, on cross-examination, that he made no agreement or contract to sell the land prior to the time he filed his sworn statement, or prior to the time he made his final proof.

SOREN HANSEN

The evidence of Soren Hansen in relation to the acquisition of title to this tract of land appears at pages 512 to 532 of the record; his cross-examination at page 527.

At pages 516 and 517 the witness Hansen testifies to a conversation with Clarence W. Robnett in relation to his taking up a tract of land, which conversation was in part as follows:

A. Why I met him one day on the street, and he says, "Don't you want to take a timber claim, George?" And I said no. I told him I didn't want no timber claim, I didn't have time to go after it; I didn't have the money to spare; I didn't want to put money into a timber claim. And he said he would tend to the whole matter and that it wasn't necessary for me to go up there.

Q. What did he say about the money?

A. Why he said he could furnish the money, or get the money for me, whichever it was.

Q. And now were you to get anything out of that timber claim, or how was that?

A. Why, I asked him what there was in it, and he said, "I ought to be able to get you from three to five hundred dollars out of the place."

Q. How were you to get the three or five hundred dollars out of it?

A. Why, when he sold it. He said he would be able to sell it; he had more claims, and he would be able to sell it for me.

On page 522 the witness testifies to the execution of deeds to the land, and testifies concerning the execution of the deed dated February, 1906.

A. Why, Clarence he came to me one day and says, "I got a chance to sell that timber claim for you, and if you will make out a deed to it, why I will, I can turn it over to them whenever it is sold, and I wont have to call on you." So I made out the deed.

Q. Now, the next deed you identified, dated May 16, 1908, running from Soren Hansen and wife to E. W. Thatcher, do you remember the circumstances of making that deed?

A. Yes, he wrote up to me, he sent the deed, it was already filled up, sent it up to me, and wrote to me to fill it out and have it proved, prove it before a notary public and have it signed and acknowledged and sent down to him.

The witness also testifies to the execution of the deed running to William F. Kettenbach, and that he executed the deed and sent it down to Robnett; and also the deed to the Clearwater Timber Com-

pany; and on page 524 testifies that Mr. Robnett gave him \$50 when he executed the deed to Mrs. Thatcher.

In relation to this entry we call the Court's attention to the evidence of William F. Kettenbach, found at pages 1689-90-91 of the record, wherein the witness Kettenbach testified that he was familiar with the manner in which the deed was acquired for the Clearwater Timber Company. Beginning on page 1689:

Q. I wish you would tell what you know about that claim, and what your connection with it is?

A. Well, it was—I don't just exactly remember the date, but I remember that Robnett (who was in the bank) spoke to me one day about having a claim for sale.

Q. That is the defendant Robnett?

A. Clarence Robnett, yes. And that he had a deed there in the bank for the claim all signed up by this man Hansen, but there was no grantee in it at all. He said that the man was hard up, and was owing a mortgage on the claim and which mortgage they were going to foreclose on him, and he would like to sell it. And he asked me if I couldn't make some disposition of it; and so I told him I would look around and see, and I went to Nat Brown of the Clearwater Timber Company and gave him a description of the claim and asked him if he could make an offer on it, and he said he would look up his estimate and see if he had an estimate on that particular piece of ground, and I think it was

a few days after that he told me what he could pay for it. Well, I says, "Brown, it can be handled all right, and if you say you will take it, why, I will get it for you," so he says, "All right." I had several dealings with Brown along the same line, so I went to Robnett and I says: "Well, Nat Brown will take the claim, and how much does the fellow want for it." In fact, I think Robnett had told me how much it would take, anyway, before to get it. Well, he says, "Mrs. Thatcher has a mortgage of a thousand dollars with interest on it, and it will run up quite a bit, but if they can get the principal they will take the thousand dollars even money." Well, I says: "All right, I will have Curtis Thatcher come in and pay him the thousand dollars, because I have already an abstract on the claim."

Q. And you paid the thousand dollars and obtained a relinquishment—

A. A release of the mortgage. And recorded the release of the mortgage.

Q. That was your own money that you paid?

A. That was my own money that I paid, yes, sir. And then I paid over to Robnett, or saw Robnett pay Hansen; I don't know whether I paid any or not to Hansen, but whether I paid Robnett and he paid Hansen, I am not sure; but I know Robnett got the money, and was to pay Hansen the \$60, because he had to pay \$60 over and above the mortgage. \$1060 was what the claim cost me, plus the abstract.

Q. Then the deed was made to the Clearwater Timber Company?

A. The Clearwater Timber Company.

Q. Then what happened?

A. Well, as I was going along with the abstract, I had ordered the abstract made up, and

after I had paid the mortgage and paid Robnett to pay Hansen, I got the abstract, and then I found there was a *lis pendens* on the claim which was a surprise to me. I didn't know anything about that. I figured that the only suits there were, were on our own lands, and I run on to this *lis pendens*. And in the meantime Brown had given me a deed drawn up—they have a separate form of deed, different from anybody else—and he had given me one of their deeds to have him execute, and if they was paid all the money and everything, the claim was to go to Brown. Of course, I was acting more in the position of a vendor, you might say, but I was paying out my own money and doing all of this, and when it was turned over to Brown I was to get my money back. Well, as I say, as soon as I got the abstract, I noticed this *lis pendens*, and I went to Brown and I told him, I says: "Brown, here is a *lis pendens*; I didn't know it until I got the abstract." He says, "The claim has never belonged to us, and it must be a mistake that they are sueing on that claim," and I says "Couldn't you take it to your attorney and find out?" And he did that; and then of course he couldn't take it.

Q. Then you asked for a deed to yourself? (Page 1692 of the record).

A. Then I asked for a deed to myself.

Q. And you prepared the deed?

A. I prepared the deed, and gave it to Mr. Robnett.

Q. And that is the deed that was offered here in evidence, wasn't it? (At 1692-3 of the record).

A. Well, I didn't know it had been offered in evidence. But the condition was this: It was just about that time, Mr. Gordon, where things

got to that stage where this bank trouble came up, the first exposure of the thing and, I had my money tied up in it, and I felt that Robnett was naturally not interested in me any more or in us, and it seemed apparently he had not been for quite a while, and I was there with my money out, and nothing to show for it. There was no reason why Robnett could not have gone to Hansen and got a deed to myself, so I took the matter in my own hands, and on my own volition I took the deed I had used, conveying the land to the Clearwater Timber Company, and put that on record, feeling that I could go to them and that they would quitclaim back to me, and in that way I could protect myself, and that is the reason I did that.

The witness Hansen testifies, on cross-examination, at page 528-529 of the record, that the affidavit he made at the time of filing his sworn statement was true; that he had no agreement to sell the land to anyone prior to the time he made his final proof.

E. N. BROWN.

The evidence of the witness E. N. Brown appears at pages 1667 to 1687 of the record, and is the same in substance as the evidence given by William F. Kettenbach.

JAMES C. EVANS.

The evidence in relation to this entry is very meager, and the evidence of Clarence W. Robuett, unsupported as it is, is insufficient to show fraud in connection with this entry. The entryman, James C. Evans, did not appear and testify, but we call the Court's attention to the evidence of C. W. Colby, at pages 3081 to 3111 of the record, in relation to this entry, which shows conclusively that there was no fraud or irregularity in the matter of the acquisition of title to this land.

C. W. COLBY.

At pages 3080 to 3085 the witness Colby relates in detail all of his transactions in relation to the entries of the various entrymen, among them being James C. Evans, Lon E. Bishop, Frederick W. Newman, Charles Dent, Charles Smith and others, in which the witness states (page 3082) :

“A. Well, these entrymen were in the employ, had been for some time in the employ of Small & Emery, except perhaps Mr. Dent, who wasn't particularly employed by them, but had considerable dealings—he kept a house at which they stopped in going and coming, and also kept some goods, and they got goods from him in going and coming from Lewiston to the timber, and these—there was a good deal of talk about taking up

timber and these parties concluded that they wanted some, and Mr. Emery had been engaged in locating parties on timber, had made a business of it, and finally located them on timber."

At page 3084 of the record the witness testifies concerning the borrowing of the money with which to make final proof; that he finally spoke to William F. Kettenbach regarding a loan of money, as Mr. Skinner and other parties had failed to make the loan, and the witness says in part (3084 of the record):

"A. Yes, sir; and asked him (meaning Mr. Kettenbach) for a loan of this money to prove up with, and I think he said he would speak to Mr. Kester about it, and let me know in a short time, or perhaps let me know in the morning; anyway, it was only a short time he took to give me an answer. * * *

A. I mean made proof; yes, sir. Excuse me. When they were ready for the money, I got the money from the bank and handed it to them, and they went and made their proof.

MR. TANNAHILL: Then what happened after they made their proof?

A. Well, Mr. Kettenbach says: 'Now,' he says, 'I look to you, Mr. Colby, to get those mortgages and see that this thing is all straight,' and so I waited around until they made their proof, and when they did, I asked them to go up to Mr. Barnett's office—I went up into Mr. Barnett's office before this, and told him the boys were making proof and I would like to have them give a mortgage, and told him I would like to have him remains in his office—it was getting late in

the evening then—and I wanted him to remain there to fix up these mortgages and he said he would and did. * * * Emery came up and says: 'The boys want to sell instead of giving a mortgage. They say they will have the same trouble about meeting the mortgage they are having now, and prefer to sell, if they think they can get a reasonable price,' and asked me if I thought Mr. Kettenbach would buy it, and I says: 'I think not; it is so soon after proving up, but,' I says, 'I will go and see him.' I went and saw Mr. Kettenbach and he says: 'Have they proved up?' and I says, 'Yes.' 'Have they got their final receipts?' and I says, 'Yes.' 'Well,' he says, 'it as much theirs now as it will ever be,' and he says, 'Yes, I will buy them if I can get them right,' and he says, 'What will they cost?' and I says, 'They will average about \$750 or a little less, some more.' 'Well,' he says, 'I will see Mr. Kester about it and let you know in a little while,' and I saw him again, and he says, 'We will take them if they don't cost more than \$750,' so then I told Mr. Emery that Mr. Kettenbach would buy them, and what he would give, and Mr. Emery seemed to understand by that what the boys wanted for them, and instead of making mortgages they made deeds (Page 3086 of the record).

On page 3082 of the record the witness testifies that he has known Clarence W. Robnett for twelve years; that he never talked with Kester about these claims at all. On page 3087 the witness states that he never came into the main body of the working room of the bank, at Kester's desk, or in Kester's private office, or at any other place, and made the

statement testified to by Robnett, in substance: "George, I came in to talk with you in regard to the timber matters' (meaning Mr. Kester), and did not state to Kester, "Fred Emery last Sunday cruised out some claims in 39-3, and we located six men on them. We are to furnish them with money and all expenses to prove up, and are to pay them each \$200 for their right. Now we have fallen down on being able to get this money"; and the witness did not ask Kester if he would go ahead and take them up under the same arrangement, and take care of these parties; that no such conversation occurred; and on page 3087 of the record testifies:

"Q. I will ask you if at the same time, or at any time, you stated to Mr. Kester, or anyone else, what the entrymen were doing, or that they were to go ahead and prove up, and deed the claims over to Colby and Emery, meaning yourself and Emery, for \$200 each?

A. No, sir; there was nothing of that kind. Nothing suggesting any such thing in the conversation at all."

The witness also states (page 3088 of the record) that he made no statement to Mr. Kester and Mr. Kettenbach, or either of them, that they should take the land over from the entrymen upon the same terms, and under the same agreement, as the agreement with Colby and Emery, and in answer to the question states:

"A. No; that whole conversation as related there is absolutely false from beginning to end. There was not a syllable of anything of the kind ever occurred. I never talked with Mr. Kester one moment about it. Not a word."

At succeeding pages of his evidence (3088 to 3092), the witness denies each and every conversation which Robnett claimed to have overheard, and stated that no such conversation ever took place.

FRED W. EMERY.

The evidence of Fred W. Emery, found at pages 3115 to 3138 of the record, is substantially the same as that of Mr. Colby and that of Mr. Kester.

LON E. BISHOP.

The same evidence applies with equal force to the entry of Lon E. Bishop. He is one of the entryman designated as the "Colby and Emery" claims; and we submit that the evidence heretofore quoted and referred to applies with equal force to this particular entry.

FREDERICK W. NEWMAN.

The same applies with equal force to the entry of Frederick W. Newman. Neither of these entrymen appeared and testified in relation to their entry.

CHARLES SMITH

The same condition applies in relation to the entry of Charles Smith, and we will not enlarge upon what we have heretofore stated.

CHARLES DENT.

The same condition exists in relation to the entry of Charles Dent. This entryman appeared and testified as a witness for the Government, his evidence appearing at pages 716 to 736 of the record. The most important evidence given in relation to this entry of the entryman is given from pages 716 to 721 of the record in which the witness states:

"A. Mr. Emery was locator at that time, and he asked me if I had ever taken a claim, and I told him no; and he wanted to know why I didn't take one. Well, I told him I didn't know as I had much use for one; I couldn't sell it. 'Oh, yes,' he says, 'I could sell a claim most any time.' So I concluded I would take one.

Q. Did he tell you how much the claim would net you?

A. Oh, I told him if I could get \$100 for the claim I wouldn't mind taking one. 'Well,' he says, 'you can easy enough get \$100.' He says, 'Most anybody will give you \$100 for it.' "

The witness also states that he had part of the money at that time to purchase the claim. He also testifies to making his final proof, and to succeeding in selling the land; and on cross-examination the witness testifies that the first conversation with Mr. Colby, or anyone else, in relation to selling his claim, was after he had made final proof. On cross-examination (at page 741 of the record), the witness testifies that the affidavit he made at the time he filed his sworn statement—that he had no agreement to transfer or sell the land—was true; that he had no understanding or agreement with anyone to sell his land prior to the time he made his final proof.

EDWARD M. HYDE.

The evidence in relation to this entry is very meager, and shows no fraud or irregularity in relation to the acquisition of title to this tract of land. The witness did not appear and testify. The evidence of the defendants in relation thereto is very clear and complete, and it is unnecessary to refer to the same further.

DRURY M. GAMMON.

The evidence of Drury M. Gammon is found at pages 2101 to 2109. The witness testifies to the manner in which he acquired title to the land, and to the talk with Clarence W. Robnett regarding it, and on page 2102 the witness testifies:

"A. Oh, I told him at first I didn't know (meaning Mr. Robnett), and I asked him how much there was in it if I wanted to take it up, and he asked me if I would sell my right, and I told him no, I wouldn't sell my right the way he wanted me to.

Q. Well, how did he want you to?

A. He wanted to know if I would take it up and sell it back to him for \$100 clear of my expenses, and I told him no."

On pages 2103-4 the witness testifies that in subsequent conversations with Robnett, that Robnett was to pay so much for the timber on the land, and the purchase price depended on the timber. The witness also testifies that he paid his own expenses to view the land: and on page 2105 states:

"A. Well, as I say, I paid my own expenses until after I got the land and see how much it would come to. He didn't say whether he was going to furnish me any money at the time. He asked me if I had the money to do all this, and I told him yes."

On cross-examination the witness testifies, Pp. 2111-2113):

(Page 2111) "Q. Mr. Gammon, you never had any arrangement with Kester or Kettenbach regarding your claim, did you?

A. No, sir."

The witness also testifies that he had no conversation with either of them regarding it.

On page 2112 the witness testifies:

"Q. After you had proved up on it then you figured up what timber there was on it and made the agreement then?

A. Yes, sir.

Q. And you had no agreement with him as to the price or what you should receive, or that you would sell it to him in fact before you made final proof?

A. No."

The witness also testifies that the affidavit he made at the time he filed his sworn statement—that he had no contract or agreement with anyone to transfer the land—was true.

GUY L. WILSON.

The evidence of Guy L. Wilson in relation to the acquiring of title to this tract of land appears in the transcript; his direct examination beginning at page 371, wherein he testifies to the manner of taking up the claim, his conversation with Mr. Dwyer in relation to his location and location fee; how he

came to visit the land, his filing on the land, and all of the circumstances leading up to his final proof.

“Q. Now, what arrangements did you go there to make with Mr. Dwyer about getting the money to prove up with?

A. I went to see him to get him to locate me on a claim, and see if he could procure the money for me to prove up with.

Q. Was Mr. Dwyer in the business of furnishing people money with which to prove up on timber claims?

A. I don't know; he was a locator.

Q. Well, what was said by Mr. Dwyer when you saw him on that occasion?

A. He said he thought he could borrow the money for me and get a claim in.

Q. Was that all that was said?

A. He said that I would have to pay him for locating me on the timber claim, and he told me about what the claim would be worth. That's about all that I can remember that was said there.

Q. What did he tell you the claim would be worth?

A. Well, he said that after expenses would be paid, and I had paid him for locating, it would probably be worth \$150 to me.”

On cross-examination, at page 429, the witness testifies:

“A. He (meaning Mr. Dwyer) told me that he thought he could get the money for me, and told me I would have to pay him for locating me.”

And on page 431 the witness states :

“Q. And regardless of what might have inadvertently crept or fallen in in those other trials or that other evidence, regardless of what might have been said during that time or those conversations, the evidence that you have given here on cross-examination is substantially correct to the best of your recollection?

A. I think it is.”

ELLA WILSON.

The evidence of Ella Wilson, wife of Guy L. Wilson, appears at pages 434 to 448 of the record. The witness testifies on cross-examination to having been present during the first conversation between her husband and Mr. Dwyer, and was interrogated concerning her evidence given in a former criminal trial, and on cross-examination testified, in relation thereto, that she and her husband went over to see Mr. Dwyer about locating Mr. Wilson on a claim; that she heard the conversation between Mr. Wilson and Mr. Dwyer; that she heard Mr. Dwyer tell her husband that he thought he could get him a timber claim; that she heard Mr. Wilson ask Mr. Dwyer if he thought he could borrow the money to pay for the claim and pay his expenses; and on page 446 testified :

"Q. . And did you notice, did you see Mr. Dwyer figure up about what the expenses would be; do you remember of seeing Mr. Dwyer with Mr. Wilson, your husband, figure up about what the expenses would be, and then Mr. Dwyer gave Mr. Wilson about the value of that claim at that time, or when he could sell it?

A. Yes, sir.

Q. Did you hear Mr. Dwyer tell Mr. Wilson that there ought to be \$150 in it for the claim; that it ought to net him \$150 when the claim was sold?

A. Yes, sir.

Q. Now, Mrs. Wilson, this is the only agreement that you know of being made between Mr. Dwyer and Mr. Wilson, is it not?

A. Yes, sir.

The witness also testifies (page 146) :

"Q. And the substance of that agreement was, according to your best recollection of it and according to your best understanding of it, was that Mr. Dwyer was to locate Mr. Wilson on a timber claim, and Mr. Wilson was to pay him a location fee, and Mr. Dwyer was to help him to get the money, or borrow the money for him to pay for the land and pay expenses.

A. Yes, sir.

FRANCES A. JUSTICE.

Frances A. Justice was subsequently married to a Mr. Clausen, and she appeared as a witness as Frances A. Clausen.

On page 847 the witness testifies in relation to her taking up a timber claim, that she first asked Mr. Dwyer to get her a claim several times. She talked to him about a claim, and asked him to get her one; that she first intended to get a claim in California, but on account of some trouble in that section she did not go there.

“Q. Yes, but now what was your arrangement with Mr. Dwyer before he located you?”

A. No arrangement, only that he would locate me on a claim.

Q. And you was to pay the expenses?

A. Well, I was to pay the expenses. I borrowed the money to pay them.

Q. Well, I am speaking about your arrangements with Mr. Dwyer, you know. Who was to pay your expenses?

A. Well I was to pay the expenses after I borrowed the money to pay them.

Q. Now, explain how that was?

A. Well, I asked him to borrow the money for me to get a claim. First, I tried to get money in Wisconsin to get a claim; then I tried to get the money of Mr. Crocker, a relative of Mr. Justice, and they only had money enough to get their own claim; and I had my place mortgaged so that I couldn't very well borrow money myself; and I asked Mr. Dwyer as a favor if he would borrow money for me to get a claim, and he said he didn't know whether he could get it or not; he would try.

Q. Now what were you to get then for your claim?

A. Well, he didn't know what we would get out of it. We figured on it, and he didn't know whether he could sell the claim or not right away. He didn't know just what he would get out of it.

Q. Didn't he tell you before you went up there that he would give you \$150 for your right?

A. No, sir.

Q. Mrs. Justice, you remember testifying——

A. I remember Mr. O'Fallon coming to the house and I tried to tell him how it was, and he says, 'Mrs. Justice, you are evading the truth,' every time I would try to tell him how it was.

Q. Now, one moment; you made an affidavit for Mr. O'Fallon, didn't you?

A. Well, he scared me pretty near dead. I was pretty near crazy at the time—I was sick, and he said: 'We know just how that was, and you will have to tell me just how it was,' and I tried to tell him how it was, and he wouldn't allow me to tell it that way.

Q. You signed the affidavit and swore to it, didn't you?

A. I signed the paper there, but I was just about wild, I didn't know what I did sign."

On page 858 the witness testifies:

"Q. Now, do you remember whether or not you had an arrangement with Mr. Dwyer by which you were to take up your claim and he was to furnish all the expense money, and the money for final proof, and that you were to get \$150 out of it, after all expenses had been taken out?

A. He thought there would be about \$200 when he could sell the claim. The way we figured about that, the way that other claims was selling."

Here we desire to call the Court's attention to the proceedings appearing on pages 859 to 860 as evidence of the witness's condition. The witness heretofore testified that she was in ill health at the time O'Fallon and another special agent called upon her, looked through the house to see that she was alone, then locked the door, began to threaten and coerce her, and when she did attempt to tell them the truth, they would invariably accuse her of evading the truth, telling her they did not want to cause her any trouble, that the Government had sent them, and she must tell it in a different way, and by this means compelled her to sign an affidavit which was false. She was in ill health at that time, had just buried her son who was killed by an accident, and just a short time prior thereto had suffered the loss of her husband by death. That she was in the same weak and ill condition at the time she testified at Moscow, when she was threatened and coerced by Ruick, Goodwin and O'Fallon. As evidence of her condition then, and her condition now, the proceedings on page 861 clearly indicate:

"Q. Well, now, I will show you the record, and ask you to read from the question at the top of page 383. 'Now state what that understanding was'; then at the bottom of the page where the answer is——

NOTE BY REPORTER: Witness fell forward from the witness stand, apparently in a fainting condition, and was assisted by her husband and a lady friend. Informal recess was thereupon taken. At 11:05 o'clock the hearing was resumed."

On page 861 the reporter's note is as follows:

"The witness, Frances A. Justice, was thereupon excused from further testifying at this time."

On page 1366 of the record the witness testified:

"Q. I have just read these questions, and I shall read them again, and ask you if you remember them. I read from page 382 of the record of case 1605, and ask you whether or not you remember these questions being read to you at the time I refer to, and whether or not you made the replies which I shall also read."

Here follows a quotation from the record of the evidence of the witness in the former trial, and on page 1370 of the record, the witness testifies:

"Q. Well, are they the facts as you understand them?

A. I was to give a contract to secure that money. I gave a contract to secure the money until I should sell the claim.

Q. Do you remember when you gave that contract? Did you give it when you first spoke to him about it?

A. No, sir.

Q. It was after you made the proof?

A. Yes, sir."

On page 1371 the witness testifies:

"A. The understanding was from the way we figured that it should bring \$150 or \$200 at the way claims were selling above expenses; there was no terms that there should be that much, but we thought they would bring that much."

On pages 1373 to 1383 of the record the witness was asked concerning her sworn statement and evidence given at the former trial, or the trial of the criminal cases at Moscow.

On pages 1378-1379 the witness testifies:

"A. There was no agreement that I would sell the claim."

On page 1384 the witness testifies:

"A. I remember there was a good many questions asked me, and I remember, too, that Mr. Ruick told me that I would be indicted if I didn't answer questions about the way those fellows made me make the statement. They wouldn't allow me to make the statement the way I wanted to make it. They said, 'You are evading the truth now, Mrs. Justice; that isn't right,' and they had me so worked up that I don't remember how I did answer questions."

On cross-examination, at page 1411, the witness testifies as follows:

"Q. Mrs. Clausen, will you state in what way you was treated when Mr. Goodwin and Mr. O'Fallon had you sign this affidavit; what they did, and what they said to you, as well as you can remember?

A. They came there to the house and wanted to know if I was alone, and they said they were sent there by the Government to get a deposition

from me, and they went and looked into every room in the house to see whether there was any one in the house that could hear it, and they asked me questions, and whenever I would try to tell how it was, Mr. O'Fallon said: 'Look out, Mrs. Justice, you are evading the truth; we know just how that was, and you are not telling it as it was.'

Q. Did he tell you how it was?

A. Yes; he would tell how it was, and would say, 'That is the way it is.' And the next question he would ask, it was the same way: 'Now, look out; you are evading the truth. We have found out all about this; we know there was a prior agreement, and you was to get \$150,' and all that sort of bosh, and wouldn't let me tell how it was."

We also call the Court's attention to the evidence of the witness appearing at pages 1416 to 1419 of the record.

EDNA P. KESTER.

Edna P. Kester was the original entrywoman; is the wife of George H. Kester; purchased the land with money given her by her husband; is the owner of the same; has never conveyed it, and never made any contract or agreement with any person for its conveyance. There was no fraud or irregularity in the acquiring of title to this tract of land.

The evidence of Edna P. Kester appears at pages 736 to 744. Upon cross-examination, at pages 743-

744, the witness testifies that the affidavit made at the time of filing her sworn statement was true; that she has no contract or agreement with any person for a conveyance of the same.

ELIZABETH KETTENBACH.

The evidence in relation to this entry is very clear and complete. She is the original entrywoman, and has never made any contract or agreement with any person for the conveyance of the land.

The evidence of the entrywoman appears at pages 1557 to 1592 of the record.

WILLIAM J. WHITE and MAMIE P. WHITE.

The entries of William J. White and Mamie P. White were made in good faith. They were entitled to acquire land such as they did in this case. After they made their final proof, paid the purchase price, they held the land for several years, and finally sold the land to Elizabeth White, mother of William J. White.

The evidence of William J. White in relation to the acquiring of title to these two tracts of land appears at page 490 to 512 of the record.

MARTHA E. HALLETT.

The evidence of Martha E. Hallett appears at pages 1592 to 1609 of the record.

On page 1593 the witness testifies in relation to her acquiring title to the land, and that she never talked with Mr. Kester concerning the acquiring of title to a timber claim. On page 1595 the witness testifies that she first spoke to a gentleman who was rooming at her place about taking up a timber claim; that she, with Mr. and Mrs. Kester and Mr. and Mrs. White and Elizabeth White went to view the land. That she paid William Dwyer \$100 for locating her.

On pages 1600-1601 the witness testifies to the manner of her procuring the money with which to pay the purchase price, and on page 1608, on cross-examination, testifies that Mr. Kester collected a note for her of some \$16,000 or \$17,000, as well as other collections; that she handled considerable sums of money, and most of it was handled through Mr. Kester, who acted for her.

The evidence shows that this entry was made in good faith; that the entrywoman still retains her land, and has made no contract or agreement to convey the same.

DANIEL W. GREENBURG.

The evidence of Daniel W. Greenburg appears at pages 700 to 716 of the transcript.

At page 702 the witness details the manner in which he went to the land, first being located by Mr. Dwyer, and on page 703 testifies that there were no arrangements made at all; that Mr. Dwyer simply said that he could locate the witness on a good claim, one that would satisfy the witness and would be all right.

On page 715 of the transcript the witness testifies, on cross-examination, that there was no contract or agreement between himself, Mr. Kester, Mr. Kettenbach or Mr. Dwyer, or either of them, for the sale of the land, prior to the time he made final proof; that the affidavit he made at the time he filed his sworn statement was true.

DAVID S. BINGHAM.

The evidence of David S. Bingham in relation to this entry appears at pages 1139 to 1171 of the transcript, the cross-examination appears at page 1156, and his re-cross-examination at page 1168.

The witness testifies to his taking up the claim; to his making final proof; and on page 1141 the witness

details a conversation which he claims to have had with Jackson O'Keefe, which evidence was admitted over the objection of the defendants, as follows:

"WITNESS: He wanted to know the reason why I didn't take up a timber claim myself. That he would be up in that country. He says, 'You have been mining up there,' and he says, 'You have used your money up there,' he says, 'and I don't see why you don't get some of it back.' 'Well,' I says, 'I have been thinking about that, Jack,' I called him Jack for short—I says, 'I think possibly I may.' 'Well,' he says, 'you had better go down and file,' which I did, and I filed."

At pages 1142-1143 the witness testifies:

"Q. Now, was there anything said between you and Mr. O'Keefe or any of the other defendants relative to what you would do with the land after you took it up?

A. No, sir; only with O'Keefe.

Q. And what was that?

A. As far as Kettenbach and Kester and Mr. Dwyer is concerned I never talked land to them one way or the other. What business I done, I done with O'Keefe.

Q. Now, what was your understanding with O'Keefe?

A. My understanding was I had to take this claim up, and he was to have the prior right of buying after I proved up."

The witness also testified that there was nothing said as to the price, and testifies concerning his understanding of the relations existing between Kester, Kettenbach and O'Keefe: which was objected to

by the defendants, and which objections the defendants are entitled to have sustained, and the evidence excluded.

On page 1144 the witness testifies as to some statement which he claims O'Keefe made to him, that he was in some way connected with Kester and Kettenbach, and that he would like to have a prior right to buy the witness' claim if he felt disposed to sell it. The evidence falls far short of an agreement to sell the land prior to the time he filed his sworn statement. It is clear that the witness had no agreement or understanding with O'Keefe that he would sell the land prior to the time he made his final proof, and he was under no obligation to sell it.

On pages 1153 to 1155 the witness details the circumstances of his selling the land, and states that O'Keefe came up to where he was living at Cloverland, and asked the witness if he wanted to sell, and the witness testifies:

"WITNESS: And there was a ten-acre tract up there—orchard tract—that I wanted to get hold of, and I had quite a bit of money coming to me, and as I thought I could get the money out of this timber claim I could buy this ten acres; and I had a talk with my wife and she thought we had better sell and take this ten acres, so I told him I would sell to him, and he says, 'Well, now,' he says, 'the arrangement is,' he says, 'to let you have over and above expenses,' he says,

‘that you was to go down there, why,’ he says, ‘\$150.’ ‘Well,’ I says, ‘I might as well take it, Jack, along with the balance of them.’ He told me he had made similar arrangements as far as the Taylor boys, I guess.”

On page 1154 the witness also states that Mr. O’Keefe gave him a check for \$150. The witness’ evidence that they arrived at the agreement as to price, and the terms of sale at that time, is complete.

Cross-examination. On page 1156 of the evidence the witness testifies, on cross-examination, and identifies an affidavit which he made before George H. Rummons, a notary public, and the witness read the document. The affidavit was very clear, and while the witness does not remember some of the statements made in the affidavit, yet the matters contained in the affidavit were substantially correct.

We call the Court’s attention to the statement made in the affidavit, appearing at page 1159 of the record, in which the witness says:

“After I had filed, I had a conversation with O’Keefe in which I asked him (O’Keefe) if he was investing in timber up there. He said, yes; he was intending to buy a little. I asked him what he was paying for a quarter section, and he said: ‘I can’t talk about buying until after you prove up.’”

At the bottom of page 1160 the witness admits that the affidavit is substantially correct, and the affi-

davit is in conflict with any theory, suggestion, or inference that there was an agreement to purchase the land prior to the time the witness filed his sworn statement or made his final proof. The affidavit referred to is Defendants' Exhibit "H", appearing at pages 4139 to 4142 of the record.

WILLIAM McMILLAN.

At pages 532 to 551 of the record appears the evidence of William McMillan, and at page 535 the witness testifies:

"WITNESS: I told him I didn't have money enough to take one without mortgaging my place, and I told him I wouldn't do that. And so he said if I took a notion to take one, if I needed a little money, he would help me out: which he did. I had part of the money, but didn't have enough."

There is nothing in the witness' evidence that would indicate that the witness had a prior agreement for the sale of the land, but all of the facts and circumstances show clearly that there was no such agreement.

On cross-examination the witness testifies, at page 549 of the record, that he held his land for nearly two years after he made his final proof: that he used about \$100 of his own money, and borrowed the

balance of the money from Mr. Kester. That the affidavit he made at the time he filed his sworn statement—that he had made no other application; that he had not applied to purchase the land upon speculation, but for his own exclusive use and benefit—was true.

It is very clear that there was no fraud or irregularity in the acquisition of this tract of land.

HATTIE ROWLAND.

There is nothing in the record which would indicate that there was any fraud or irregularity in connection with the acquiring of title to this tract of land. The entrywoman was not called in support of the charges in the bill.

WILLIAM HELKENBERG.

This witness did not appear and testify, and there is no evidence that there was any fraud or irregularity in connection with the entry of this witness; and the bill should be dismissed as to this entry.

WILLIAM HAEVERNICK and ALMA
HAEVERNICK.

This entryman and entrywoman appeared and testified, the evidence of William Haevernick appearing at pages 470 to 485, and that of Alma Haevernick at pages 485 to 496 of the record.

There is nothing in the evidence of the witnesses, or appearing of record, to show that there was any fraud or irregularity in connection with the acquiring of title to these two tracts of land. They have long since been transferred to the Clearwater Timber Company, which is an innocent purchaser, in good faith, and without notice of any irregularity, if any such did exist. These two entries should never have been included in the bill.

GEARY VAN ARTSDALEN.

The same condition exists in relation to this entryman, and the land has long since been transferred to the Clearwater Timber Company, which is an innocent purchaser, for value, without notice of any fraud or irregularity in the acquisition of title to the land.

ROBERT O. WALDMAN.

The evidence of Robert O. Waldman shows that there might have been an understanding between the witness and Clarence W. Robnett. His evidence appears at page 3725, direct examination, cross-examination 3736, re-direct examination 3746, re-cross-examination 3746.

The evidence shows that long after final proof was made the land was transferred to the Lewiston National Bank, for value, and in good faith. We submit, however, that even the evidence of the witness Waldman himself falls far short of a prior agreement, even with Robnett. The evidence of the entryman, Robert O. Waldman, shows that Robnett gave him the privilege of paying him a location fee of \$100, or accepting \$400 for his right, and he deed the claim over to Robnett; and the witness testifies:

"A. I told him I would much prefer to take it up on my own hook, and furnish the money myself, as I felt able to do so at that time, and it was agreed that he was to look around for a claim for me. Then, in the course of a week, matters turned up that made it impossible for me to use my own money, and I told him so; and the witness testifies that he then told Robnett he would accept the latter's proposition."

The cross-examination appears at pages 3736 to 3740:

"A. He said I should try to get the money myself and pay him a location fee, and sell to whoever I could, and if I couldn't do that, he would probably—he would try to raise the money for me."

The lower court has found that there was fraud in relation to the acquisition of title to this tract of land, but that the defendants were in no way or manner connected with the same, and as Robnett was an employe of the Lewiston National Bank, and the land was transferred to the Lewiston National Bank, the bank had such notice as warranted the cancellation of the entry.

ROWLAND A. LAMBDIN.

The evidence of this witness appears at pages 2153 to 2158 of the record.

The witness refused to testify for the reason that his evidence would be in conflict with the evidence he had given in the criminal case, which evidence was read into the record over the defendants' objection, and which should be stricken therefrom. It is very clear that the evidence given at the criminal trial was false, and as there is no competent evidence in the record affecting the validity of this entry, the entry should remain intact. Then, the evidence shows that the land has been transferred to the

Western Land Company, for value, which paid the purchase price, and which had no notice or knowledge of any irregularity in connection with the transaction.

IVAN R. CORNELL.

The evidence of Ivan R. Cornell appears at pages 2800 to 2860 of the record. He testifies to a prior agreement with George H. Kester. As to whether or not there was such an agreement depends upon the evidence of the witness Ivan R. Cornell being weighed against the evidence of Geo. H. Kester and William Dwyer, and all the facts and circumstances in the case. The reputation of the two defendants is quite as good as that of Ivan R. Cornell, who admits that he swore on various occasions that there was no prior agreement, and after his indictment, and his conversation with N. M. Ruick, former U. S. Attorney, and his own attorney, he decided to testify that he had a prior agreement. The witness shows a high degree of prejudice against the defendants and at the close of his cross-examination testified, at page 2860 of the record, that, if there was anything he could do to cause the defendants to lose their lands,

he certainly would do it, and, on page 2860, testifies as follows:

“Q. You are not on friendly terms with the defendants, are you?

A. I should say not; no. I guess you wouldn't be either, after the insulting questions that were asked.

Q. You haven't been on friendly terms with them, have you?

A. No; I don't want to be, either.

Q. If there was anything you could say that would help them to lose their land, you would be willing to say it, wouldn't you?

A. I certainly would, yes.”

The land has been long since transferred to the Potlatch Lumber Company, which paid full value for the same, and without notice of irregularity in connection with acquiring title to the same.

As weighed against the evidence of Ivan R. Cornell, the Court should also take into consideration the evidence of Ab. Masters, Chief of Police of the City of Lewiston, found at pages 3076 to 3078 of the record, and that of William Schuldt, who is at present United States Deputy Marshal for the District of Idaho, his evidence appearing at pages 3067 to 3075 of the record. The witness Cornell is in conflict with these two disinterested and reputable witnesses, as well as in conflict with the evidence of George H. Kester and William Dwyer.

FRED W. SHAEFFER.

The evidence of the witness Fred W. Shaeffer appears at pages 448 to 469 of the record. The cross-examination appears at pages 464 to 469. The evidence of this witness falls far short of showing a prior agreement. Then, even if a prior agreement was proven, it would not affect the title to this land, for the reason that it has long since been transferred to the Potlatch Lumber Company, which is an innocent purchaser, for value, and without notice of any irregularity in connection with the claim.

We have not taken up the evidence of the defendants in relation to these particular entries for the reason that we do not desire to extend this brief to any greater length, but will ask the Court to carefully examine the evidence of the defendants, and of their witnesses, in passing upon the same, as applied to the various entries.

REPLY TO APPELLANT'S BRIEF.

On page 4 of appellant's brief we find a reference to the evidence of Clarence W. Robnett and Harvey J. Steffey, and a complaint that the lower court arrived at the conclusion that these two witnesses were not worthy of belief; and also a complaint that the

court gave weight and credibility to the testimony of Kettenbach, Kester, Dwyer and other witnesses, as though it came from disinterested persons.

We can hardly understand how a court could consider the evidence of the various witnesses, and arrive at the conclusion that the witnesses Clarence W. Robnett and Harvey J. Steffey were or are worthy of belief. Robnett and Steffey each admit the commission of perjury and subornation of perjury upon various occasions. They admit that they knew they were committing perjury and suborning the commission of perjury, and neither thereof seems to feel the least remorseful on account of the same.

The references to Kester, Kettenbach and Dwyer are in the nature of opinions of counsel for appellant, and in no place is such opinion supported by evidence which is strong, convincing or conclusive. The defendants are not only supported by evidence of witnesses who are worthy of belief, and who are disinterested, but in almost every case are supported by the evidence of the entrymen themselves and by other persons whom the appellant called as witnesses in an effort to sustain the charges in the bill.

The witness Steffey is not only impeached by the evidence of Kettenbach, Kester and Dwyer, but also by the evidence of the entrymen and entrywomen,

and by the facts and circumstances surrounding the transactions; and we here call attention to the discussion of the evidence of the various witnesses comprising the Steffey Group, elsewhere in this brief, and wherein we have referred to and considered the evidence of Steffey himself.

For instance, the witness Steffey testified that Kester, Kettenbach and Dwyer paid the entrymen and the entrywomen a specified amount for the taking up of the land and the transferring of the same to the defendants, and upon cross-examination it developed that neither Kester, Kettenbach nor Dwyer knew the entrymen and entrywomen had been located upon the claims, or had made their final proof until some time thereafter, and until Steffey applied to the defendants to sell the land to them (Evidence of Steffey, pages 1825-1826 of the record).

It also appears that a different consideration was paid to each of the entrymen and entrywomen according to the value of the land; that Steffey drew checks upon his own bank account for the money, and, when a settlement was made, the money was paid to Steffey and he received credit in his account for the entire sum paid as a consideration for the transfer of the land. None of the entrymen or entry-

women came in contact with the defendants until their land was sold and the deeds executed.

Then, it seems that Steffey did not go to the officers in charge of the prosecution and place before them the matter of his wrong-doing in relation to the purchase of this land for the purpose of vindicating the laws of the United States, or on account of any remorse he felt by reason of his various acts, but because he desired to avenge some real or imaginary wrong which he imagined he had suffered; and we call the Court's attention to the cross-examination of Steffey upon pages 1851-1852 of the record:

“Q. Now, when did you first wake up to the realization of the fact that there was something wrong about this transaction?

A. Before I entered into it.

Q. When did you make up your mind to tell the Government officials about it?

A. Well, some time after Dwyer had tried to sell my barn, and did other things in connection with it.

Q. As a matter of fact, you did it more to even up with Dwyer than anything else, didn't you?

A. No, I was perfectly even with him before.

Q. You was even with him before? Then did you do it to even up with Kester and Kettenbach?

A. I had nothing to even up with them.

Q. But if you hadn't been mad at Dwyer you wouldn't have done it, would you?

A. Possibly I might.

Q. It wasn't for the purpose of vindicating the laws of the great commonwealth that you did it, then, was it?

A. Not exactly, no, sir.

Q. It wasn't because you had repented of anything wrong that you had done or a kind of remorse, or anything of that kind?

A. Oh, not in particular, no, sir.

Q. But it was simply to even up with Dwyer?

A. No; I considered myself even with him.

Q. You considered yourself even, but you wanted to go him one better?

A. No, not in particular."

We are unable to set forth here the entire evidence of Harvey J. Steffey, but inasmuch as the trial court observed the evidence of Harvey J. Steffey when he testified against the defendants in the criminal case, and upon various other occasions, and in view of the admissions the witness was compelled to make, we can hardly understand how the court could view the evidence of Steffey as coming from an undefiled source, and as that class of evidence worthy of respect, or how the court could give any weight to the evidence of this witness at all.

CLARENCE W. ROBNETT

We have heretofore referred to and discussed the evidence of Clarence W. Robnett, and we will not enter upon an extended discussion of the same here,

but in view of the fact that Robnett had embezzled \$137,000 from the Lewiston National Bank, was under various criminal charges, and a long term in the penitentiary was staring him in the face; that he had committed perjury on various occasions; that he knew that he was committing perjury, and, as late as July, 1909, made a false affidavit in relation to the Carrie D. Maris claim which he knew was false at the time he made it; that he was testifying for the prosecution with the hope of gaining some consideration by reason of his so testifying; and the fact that he was immediately pardoned after being sentenced by the trial court to a term of ten years in the Federal penitentiary, and released from the serving of any time whatever for such offenses by pardon from the President, (page 265 of the record), and the inconsistency of his testimony in this case, and the fact that he is impeached by almost every entryman and entrywomen who testified, not only in behalf of the appellant but in behalf of the defendants as well, we can hardly understand how any court could lend any weight to the evidence of this witness. Does this evidence come from an unde-filed source? What court can say that it does? The offenses committed by Robnett involved moral turpitude. Counsel refers in general terms to the fact

that the evidence of Robnett is corroborated. We cannot find a single instance where the evidence of Robnett is corroborated. He was called as a witness for the prosecution for the purpose of proving the fraud in relation to the several entries. The entrymen were called in an effort to corroborate the evidence of Robnett, and in each and every instance the entryman not only contradicted but impeached Robnett.

The evidence of Robnett shows that he was skillfully schooled and trained for this especial occasion. He testified upon numerous other occasions. He was cross-examined upon numerous other occasions. His evidence was transcribed. The special agents in charge of the appellant's case had the advantage of his evidence, his cross-examinations, and the mistakes he had made theretofore. They had posted him and groomed him for this particular purpose, and there was an effort to make Robnett the very best witness on this occasion that he had been upon any other. They had more time. The Court was not present to sustain objections which should have been sustained. Robnett was in a position where he could refuse to testify when he was upon dangerous ground. He did refuse to testify, and was not freely

and fully cross-examined, and could not be, on that account.

See Evidence Robnett pp. 2353, 4, 5, 6, 7, 9, 2361 2, 3, 4, 5, 6, 7, 8, 9, 2370, 2374, 2364, 2396, 2647 record.

On page 6 of appellant's brief counsel refers to the evidence of the defendant Dwyer, and wherein the defendant Dwyer was convicted upon the charge of suborning Hiram F. Lewis, Guy L. Wilson and Charles Carey, (Dwyer vs. United States, 170 Fed. 160, Case No. 1606).

We hardly see why counsel should inject that case into the case here, or his reason for so doing, save and except as an effort to prejudice this Court against the defendants, especially so as the case was reversed and the Government did not have confidence enough in the case to retry the same, and dismissed it of its own motion. Dwyer was always ready and willing to meet the charge under the rule laid down by the Court in its opinion, and the rule announced by the Supreme Court of the United States, and felt confident of his acquittal; that he had committed no offense in relation to the entry of either of the witnesses, and we call the Court's attention to the evidence of Hiram F. Lewis, at pages 901 to 977 of the record. It appears that Mr. Lewis, when he testified against the defendant William

Dwyer, was threatened and coerced into testifying falsely, but he subsequently repudiated that evidence; repudiated it when he was upon the stand in this case, and stated why he was induced to so testify in the case wherein Dwyer was convicted. He testified positively in the case under consideration here that he had made no agreement prior to filing his sworn statement or prior to the time he made his final proof; that there was no understanding between the witness and either of the defendants for the sale of his land prior to the time he made his final proof.

On page 903 of the record, the witness testifies:

Q. Did Mr. Dwyer solicit you to take up a claim?

A. No, sir."

Q. Well what did Mr. Robnett say to you?

A. Well, at that time Robnett and Nickerson were in the timber business up on the Lolo, and they wanted me to go up there and take a claim. I went up and looked at the timber and didn't like it and didn't take any. Afterwards I came back and met Mr. Dwyer one day and asked him if he had any timber.

Q. Did you ask Mr. Dwyer or did Mr. Dwyer ask you?

A. I asked Mr. Dwyer.

Q. You have testified at several trials before, haven't you, Mr. Lewis?

A. Yes, sir.

Q. And you had your faculties with you when you were testifying, did you not?

A. I guess part of them.

Q. The same as you have now?

A. Well, I don't know. The first time I testified, when Mr. Ruick was up there, why they had me in the sweat-box up there, and Mr. Ruick threatened impeachment if I didn't come out and tell things just to suit him; and there were certain things that I told Mr. Ruick and Mr. Johnson and whenever I said anything if it didn't suit them they would cut it out. * * * * *

And on page 905, the witness testifies:

Q. Now, what did Mr. Dwyer say to you in this conversation which you had?

A. Well, I couldn't tell you just what he did say just now.

Q. Well, tell us as near as you can remember.

A. I think I asked him about the claims, and he told me that they had some good claims up there, and if I wanted to take one I could make a little money out of it.

Q. Is that the way he expressed it?

A. I think so.

Q. Did he tell you what he would give you for your right for your claim?

A. No, sir.

Q. Are you sure of that?

A. Yes, sir.

* * * *

On page 914 the witness testifies; wherein counsel for appellant asked the witness if he did not testify in the former trial that Dwyer agreed to give him \$150.00 for his right, to which the witness replied:

A. I don't see how that could be, that \$150.00 there, because I never agreed to take that price.

Q. Now, I will ask you if you remember those questions being asked you, and those answers being made by you?

A. I never answered to the \$150.00 proposition; I know that. If I did I didn't intend to at the time.

The SPECIAL EXAMINER: Counsel asked you if you remember about the questions being asked you, and the answers. That is the first thing; and then, of course, you might explain whether they are true or not.

WITNESS—Well, yes, sir.

MR. GORDON: Q. You say you think those questions were asked and those answers given?

A. Yes, sir.

Q. Now, were they true, and are they true—those answers?

A. No, they are not true, not all of them.

* * * *

On page 968 the witness testifies, on cross-examination:

Q. Mr. Lewis, you said that you tried to sell your land to someone else. Can you remember who you tried to sell it to?

A. I tried to sell it to Mr. Williams, for one, and Joe Molloy, and I think afterwards Mr. Brown. There was two or three parties I know that I tried to sell it to.

Q. That was after you bought your brother's claim?

A. Yes, sir.

Q. What success did you have in trying to sell to them?

A. I couldn't get rid of it; I couldn't dispose of it. They all said it was second growth timber and didn't want it.

Q. How did you come to go to Kester and sell it to him?

A. I went to him just the same as I had been going to these others afterwards, and asked him if he wouldn't buy those claims, that I had tried to sell them to others and couldn't do it, and he finally said if I couldn't sell them he would try and see what he could do to take them off my hands.

Q. Did he tell you to go and see some one else and try to sell them?

A. Yes, sir; he told me to see someone else and to sell them if I could.

Q. And you went and tried to sell them to somebody else after that?

A. Yes, sir.

Q. Wasn't the reason your brother didn't get as much as you did, because he had a short claim, only three forties?

A. Yes, sir.

Q. That is the reason you didn't get as much for his claim as yours?

A. Yes, sir.

Q. You say that when you would tell Mr. Ruick and Mr. Johnson something that it was a fact that they would say, "Cut that out; we don't want that?"

A. Yes, sir.

Q. Because that was something that was favorable to the defendants?

A. Yes, sir; I think that was their reason for doing that.

Q. Can you remember any particular thing they told you to cut out?

A. When I spoke about selling these claims to others, they ordered that cut out.

* * * *

A. Well, in regard to borrowing the money, too.

Q. What was that?

A. He asked me or tried to make me state that I had borrowed all of it, all of this money from the bank, didn't have any of my own at the time, and I told him I did have money there at the time, borrowed it and gave my notes at the bank. (Pages 969-970 of the record).

Q. Can you think of anything else?

A. Well, in regard to intimidating me. He threatened to impeach me and indict me, and everything else pretty near, if I wouldn't come out and tell it just to suit them.

Q. I will ask you if you told them anything about paying taxes on the land, and that they told you to cut it out?

A. Yes, sir; I told him I had paid taxes for two years, and had the tax receipts at home,—I had them with me at the same time,—and they said they didn't want me to say anything of that kind, wouldn't allow it; and I have those tax receipts up home now.

Q. You did pay taxes on the land, did you?

A. Why, I paid it for two years. (Page 970 of the record).

On page 971 the witness testifies that the affidavit he made at the time he filed his sworn statement and the time he made his final proof was true.

After an examination of this witness' evidence it is hard to understand why counsel for the appellant would contend that the defendant Dwyer should have been indicted, tried or convicted upon the charge of subornation of perjury. The evidence of

the witness is in conflict with any such contention or theory. This witness was called as a witness for the appellant, and in an effort to sustain the charges in the bill. His evidence was admitted over the defendants' objections, and counsel for appellant should not have been permitted to cross-examine the witness concerning his former testimony, and make an effort to induce the witness to testify to something which was not true.

The reference which counsel makes to the evidence of William Dwyer, to his conviction upon the charge of subornation of perjury is unwarranted, is unsupported by the evidence, and should not have been made. Then, the entry of the witness Hiram F. Lewis is not involved in this action, and no effort is being made to have the patent to this tract of land cancelled.

Counsel for the appellant on pages 6 and 7 of his brief refers to the charge of subornation of perjury against the defendant William Dwyer, wherein the defendant William Dwyer was charged with suborning Charles Carey, and we desire briefly to call the Court's attention to the evidence of Charles Carey, appearing at pages 551 to 581 of the record.

On pages 557-558 the witness Charles Carey testifies:

Q. Did you suggest the final proof witnesses, or did Mr. Dwyer suggest them?

A. A few days before we proved up I asked him what there was about it, something like that, and in a few days I told him my time was up on the notice—the 18th, rather—called his attention to it, and at that time he asked me if I would have the money.

Q. Is that the first time he had said anything to you about the money?

A. That is the first time.

Q. Well, when you started this entry, did I understand that you didn't have even the money to file your original papers in the land office?

A. Oh, I had the money.

Q. Sir?

A. I had money enough to do that.

Q. Well, why was it you got it from Mr. Dwyer, then?

A. Well, I had understood from Mr. Scotty that he would furnish me the money.

Q. Furnish you all the money you needed?

A. Yes, sir.

Q. And did you have to ask Dwyer for it, or did he hand it to you?

A. No; he just handed it to me.

Q. You didn't tell Dwyer that you didn't have the money?

A. No; there was no questions asked.

Q. And then I understand you to say you went to Mr. Dwyer when it came time to make the proof, and suggested that you needed the money?

A. A few days before I said it would soon be time to prove up, and he said, "When is it, Charlie?" and I says, "It is the 18th," and he says, "Have you got money enough?" and I told him no.

Q. And what did he say then?

A. I don't remember the words he might have said. I know I got money from him.

Q. Now, did you get the money the day you made the proof, or how long before ?

A. It was the day before, I think.

And on page 561 the witness testifies:

Q. * * * Do you remember whether or not before you signed and swore to that paper that you discussed the propriety of taking that oath, with Mr. Dwyer?

A. I couldn't say whether it was the first paper or the second one. This is the—excuse me.

Q. I am sepaking of the first paper now.

Q. Yes.

A. I can't remember on that first paper, whether it was the first or second one. We discussed that question, but whether it was on the first or second one I don't know.

Q. What did Mr. Dwyer say about that?

A. He says, "You are taking it up for your own benefit."

Q. Did he explain why you were taking it up for your own benefit?

A. Yes, he said, "If you can sell it you will get something for yourself."

Q. Did he argue it with you?

* * * *

A. Yes, we argued it back and forwards and talked it over.

On page 566 the witness testified that Mr. Dwyer charged him \$150.00 for a location fee.

On page 575 the witness, on cross-examination, testifies to his being threatened by special agents,

and who it was threatened him; and on page 576 the witness testifies as follows:

Q. Now, Mr. Carey, in response to a question from Mr. Gordon, I understood you to say that you did not consider that you had any contract to sell your land to anyone, before you made final proof, and that your statement in that regard is true. That is right, is it?

A. Yes, sir, I never considered that I had an agreement.

Q. Then in your sworn statement, where you swore that, "I have made no other application under said acts." That is true, is it? You had made no other application?

A. No.

The witness also testifies that the affidavit he made at the time he filed his sworn statement,—that he had made no contract or agreement to sell the land to anyone else,—was true.

The evidence of this witness is not in conflict with the evidence of Mr. Dwyer in any material part, and shows conclusively that the charge made by counsel for appellant,—that Mr. Dwyer had suborned Charles Carey,—is unsupported by the evidence.

On page 577 the witness testifies:

Q. Now, do you not remember, Mr. Carey, that the instrument you signed when you made your final proof and gave to Mr. Dwyer was an option which gave him the right to sell the land for you if he could find a buyer?

A. I don't know what the paper was.

Q. It might have been that kind of a paper?

A. It might have been an option for all I know.

Q. And that he told you if you could sell it for any more money to go ahead and sell it?

A. He said to come and let him know.

Q. And you wasn't able to sell it for any more money?

A. No.

Q. And you finally told Mr. Dwyer that you wanted to make a settelement and settle up?

A. Yes, that I was going to leave.

Q. And that is when you and Mr. Dwyer got together and settled up, and you gave him this deed?

A. He asked me when I wanted to leave town, and I told him, and he says, "Come around to morrow or next day and I will see what I can do for you or let you know," or something to that effect.

Q. And you practically had control of your land up until that time?

A. From what he told me I supposed I did.

Q. And after you gave him this deed you considered that you had no more interest in the land after that?

A. No, I considered it sold then.

On page 577 of the record it appears that the witness made his final proof November 18, 1904, and the deed was dated April 15, 1905, so the deed was executed and the land finally sold to the defendants something like six months subsequent to the time the final proof was made.

On page 7 of his brief counsel refers to the fact that in the case of Robnett vs. United States, 169

Fed. 778, Robnett did not take the witness stand in his own behalf. We hardly see why it is that counsel should go outside of the record and comment upon this matter. Whether or not Robnett took the witness stand in his own behalf is immaterial. It seems that this Court finally decided that Robnett had committed no offense; that his case was ordered dismissed. If he was advised by counsel that in their opinion he should not take the witness stand, or if he elected to take that course of his own volition, is immaterial, and it seems to us that the comment made by counsel on pages 7 and 8 of his brief is highly improper, and especially so inasmuch as it is necessary for him to depart from the record in order to call the Court's attention to this particular feature of the case.

We have heretofore called the Court's attention to the entry made by Carrie D. Maris, referred to on page 8 of appellant's brief, and we will not enlarge upon what we have heretofore said, but we desire to call the Court's attention to this particular entry, appearing elsewhere in our brief, and invite the Court's careful consideration of the same.

On page 10 counsel refers to the comment of the Court in the matter of the pardon of the witness Robnett, and quotes at length from the Court's

opinion in regard thereto, and on page 11 of his brief counsel again departs from the record in order to apprise the Court of the dismissal of the indictments, not only against Robnett, but against the various witnesses who had been indicted by the Government in the hope of intimidating them and to compel them to swear falsely in regard to the acquisition of their timber claims. We are justified in this comment, since in many instances, especially in the case of Joel H. eBnton, Charles Carey, Rowland A. Lambdin, Hiram F. Lewis, Francis A. Justice, Prentice the two Taylor boys, and others. The record shows that most of them they were intimidated, and those who were not indicted were threatened with indictment if they did not testify satisfactorily to the officers in charge of the prosecution. We consider the comment of counsel, and his departing from the record, highly improper, but an examination of the several indictments, appearing upon pages 11, 12 and 13, will corroborate the evidence of the various witnesses, and the manner in which they were treated at the hands of the prosecution. An indictment dismissed without trial, *prima facie* was brought without probable cause.

On page 14 counsel again departs from the record, and for the purpose of prejudicing this Court against

the defendants, attempts to apprise this Court of the fact that some months before the trial of the present cases, and before the delivery of the opinion of the trial court, the defendants Kester and Kettenbach were tried and found guilty of violations of the National Bank Act, in the same court in which the present cases were tried, but before a different judge, and of the affirmance of the judgment by this Court, and takes the position that the defendants not only swore falsely in defense of themselves at the trial of the bank cases, but that they directed and caused Robnett to make false entries in the reports to the Comptroller to conceal their unlawful use of the funds of the bank, much of which was used in the timber transactions involved in the present cases. Counsel might have gone further and apprised the Court of the fact that the defendants were acquitted upon every charge of the misuse of the funds of the bank, abstraction, embezzlement, and making false entries in the books of the bank and any connection with Robnett in the matter of the charges against him (Robnett), and convicted upon the charge of making false entries in the reports to the Comptroller, which entries were made by Robnett and by Chapman. This, however, is not a matter for the Court to take into consideration in de-

termining the questions involved in these cases, and it is highly improper for counsel to inject the same into these cases, inasmuch as it is necessary for him to depart from the record in order to make the comment referred to on pages 14 and 15 of his brief.

Then, the charge that the defendants swore falsely in their own defense is unsupported by the facts in the case or by the evidence, and we do not believe that this Court should make an examination of the record in the bank case for the purpose of determining whether or not the defendants swore truthfully or falsely; but under any circumstances they could not have been guilty of as much perjury as the witness Robnett, the witness Steffey, and other witnesses who appeared and testified for the Government. We do not believe that the Court will arrive at a conclusion other than that Robnett was testifying under not only an implied, but an express agreement or understanding with the prosecuting officers, that he would be granted a full and complete pardon for the various offenses which he had committed in relation to the violations of the banking laws, embezzlement, falsification of the reports and of the books of the bank.

On page 15 of his brief counsel again departs from the record and refers to the assassination of former

Governor Steunenberg of Idaho, the confession of Orchard as to his participation therein, and his admitting his complicity in thirty-odd additional murders, his sentence to capital punishment, and the commutation of the same by the Governor. We desire to inquire what evidence there is in the record sustaining this comment? What evidence appears in the record that the now Junior Senator from the States of Idaho commuted the sentence of Orchard? Or what evidence is there in the record that the charges against Orchard were far more serious in their character than in the present case? When an attorney so far forgets himself that he abandons the record altogether and comments upon matters not appearing therein, and which have no bearing upon the case, it is conclusive evidence that the record, as it stands, is insufficient to sustain his contentions, and in order to induce the Court to reverse the judgment of the lower court it must take into consideration matters not appearing from the record, and matters which the lower court did not consider, and had no right to consider.

The evidence of Orchard and his pardon *is* much different from that of Robnett and his pardon. In the case of Orchard the trial court believed he testified truthfully; in the case of Robnett the trial court

believed he testified falsely. Notwithstanding this fact his pardon was recommended by counsel for appellant.

THE STEFFEY ENTRIES.

We have heretofore discussed the Steffey entries, referred to on page 16 of counsel's brief, and will not enlarge upon what we have said in relation thereto.

On page 17 of his brief counsel refers to the undeclared character and business and official standing of Kester and Kettenbach in the community, and again departs from the record and refers to evidence given in the bank case, which could only be done for the purpose of prejudicing this Court against the defendants; and it is apparent that the appellant is not trying this case upon the record as it stands now, but endeavoring to try the same upon the record made in the bank case.

On page 18 of his brief counsel states that he makes no attempt to excuse Robnett. I can hardly see why he should make an attempt to excuse Robnett. If there is any excuse due him, we are unable to find it. He reviews his employment as a clerk and bookkeeper in the Lewiston National Bank, and

then attempts to hold the defendants responsible for Robnett's embezzling the funds of the bank. Counsel might have gone further and stated that Robnett testified that the defendants Kester and Kettenbach knew of his embezzlement of the funds of the bank, which the jury disbelieved, and upon the indictments charging those offenses the jury found the defendants Not Guilty.

On page 19 of his brief counsel states that Robnett engaged with Kester and Kettenbach in their timber enterprises, in which they all used the funds of the bank. In order that their wrong-doing might not be discovered he made false entries in the books of the bank and in the reports to the Comptroller by their direction. Counsel again departs from the record, and we say that the evidence does not sustain the charge, and we see no reason why we should be again required to try out the bank case; and again we say that the jury found the defendants Not Guilty upon the indictment charging misappropriation of the funds of the bank, and making false entries in the books—either by directing Robnett to make the same or by making the same themselves.

On page 19 of his brief counsel states that "all we ask is that Robnett and his testimony, and Steffey and his testimony, be measured by the same legal

and moral standards as are the defendants and their witnesses and their testimony in these cases.”

Then, we can hardly see the consistency of counsel’s request that the evidence of Robnett and Steffey be measured by the same legal and moral standards as other witnesses who have testified. These other witnesses, especially the entrymen, have testified in behalf of the defendants and in behalf of the Government; they have had no interest in the outcome of the case—whether the patents were cancelled or whether they were not—made no difference to them. It did, however, make a difference to Robnett and to Steffey. Steffey admitted that he was guilty of perjury and of subornation of perjury. Unless he was protected by the officers in charge of this case as well as the criminal cases, he could have been indicted, tried and sent to the penitentiary.

Robnett had committed crimes enough involving moral turpitude to have required him to serve a term equal to the balance of his natural life, should he have lived a hundred years. He, then, had a strong motive for testifying falsely. There were many reasons for his protection by the officers. If he did testify adversely to the defendants, there was every possible reason for his protection by the officers, and this, we submit, was a strong and powerful

motive for both Robnett and Steffey to testify against the defendants, although they were compelled to commit perjury in so doing.

We therefore must respectfully contend that the evidence of neither Steffey nor Robnett is entitled to be measured by that legal or moral standard as the evidence of the defendants or that of the other witnesses who have testified in behalf of the defendants.

On page 22 of his brief counsel refers to the charge of conspiracy against the defendants, and bases that charge wholly and entirely upon the evidence of Clarence W. Robnett. This evidence is contradicted and impeached, not only by Kettenbach, Kester and Dwyer; but is impeached by Robnett's own evidence given upon the first trial of the criminal charges against the defendants, Kester, Kettenbach and Dwyer; is impeached also by the evidence of Colby, Emery, Bradbury, Bashor, the Longs, and by numerous other witnesses who have testified.

On page 30 of his brief counsel refers to the "Circle K" checks. We respectfully submit that there is nothing wrong, either civil or criminal, concerning the employment of William Dwyer by the defendants Kester and Kettenbach, their permitting William Dwyer to purchase certain tracts of timber land and pay for them by a check or draft drawn

upon Kester and Kettenbach through the Lewiston National Bank for the initial payments; and whether they were held as cash items in the bank and charged to the account of Kester and Kettenbach, or taken up by Kester and Kettenbach giving their own checks for the same, is immaterial. They had a perfect right to employ Dwyer for that purpose. They had a perfect right to pay him for his services, and there is nothing in relation to the Circle K checks which would indicate any wrongdoing by the defendants Kester and Kettenbach, Dwyer, or anyone else.

On page 32 of his brief counsel refers to the deposit slip in the handwriting of Kettenbach, and endeavors, by way of inference, to connect the same with the acquisition of certain tracts of timber land. This deposit slip bears date April 26, 1904, on the back of which were certain notations, referred to by the appellant, on page 32 of his brief.

The explanation offered by the defendants is straightforward, and is sufficient to utterly refute the theory advanced by the complainant. The amount shown by the face of the deposit slip represented money for which Mr. Dwyer gave his two checks to pay off a couple of workmen—timber cruisers—who had come to town and who desired to leave

on the morning train before the bank opened, which necessitated Mr. Dwyer's procuring the money elsewhere. As to the truth of Mr. Dwyer's explanation, his cancelled checks bear mute but irrefutable testimony to the truth of what he says. These checks appear at pages 4203-4204 of the record.

On page 3768 the defendant Dwyer testifies:

“Q. What were the circumstances of your giving these checks?

A. Why, I gave them to get some cash to pay a couple of men that was doing some work up the river, and before the bank opened in the morning. They were taking the morning train out.

Q. What were those men doing?

A. They were cruising, examining land for the purpose of laying—vacant lands, for the purpose of laying scrip.

Q. Who were they cruising for?

A. Well, they were cruising for themselves, *looking land* generally. They cruised for anybody, or would report land for anybody who paid them for it.

Q. I mean who did they—who was this information given for?

A. For Mr. Kettenbach.

Q. And Mr. Kester?

A. And Mr. Kester, yes, sir.

Q. I see the names of C. D. Whitney and C. Evans on the checks. Were they the two men?

A. Yes, sir.

Q. They were for \$48 and \$50. Was that the amount due the men at that time?

A. Yes, less \$2 there that I got; I kept \$2 for myself there for some purpose. My recollection

from looking over the checks there is that I wanted \$2 for myself, and I just simply drew a check for \$50 and gave—it was the Whitney check there—I gave Whitney \$48 and I kept \$2.

Q. That is your recollection about it?

A. Yes, that is my recollection.

Q. Do you know where these two men are at this time?

A. No, I don't.

Q. You have tried to find them since this came up?

A. Yes, I have made inquiries, but I can't find where they have been recently; I find where they have been four or five years ago, but not recently.

Q. Now, the back of this deposit slip shows Guy Wilson, \$8, and various other names here, E. Taylor, \$8; Dammarell, \$8—total \$96. Now, I will ask you if any part of this money was paid for filing fees or for any expenses of these parties whose names appear on the back of this deposit slip?

A. No, sir. That money was gotten so as those people could get away on the train. They came down the night before on a raft, down the river, and I told them I would get the money for them in the morning in time for them to make the train. I went to the cigar store and got the money.

Q. Do you have any knowledge of Kester and Kettenbach, or either of them, paying the filing fees or any expenses in relation to these various parties whose names appear on the back of this deposit slip?

A. No, sir."

The evidence of the defendant Kettenbach in relation to this matter appears on pages 3760 to 3766 of

the record. On pages 3760-3761 the witness testifies:

"As far as the front of the deposit slip is concerned, I know nothing more than what it shows itself. It appears that I made out a deposit slip for Kittie E. Dwyer for \$96, to the effect that it was two checks given to Wiggen for cash, just what it says on the face; and in the column on the left-hand side of the deposit slip there is an entry of \$50 and \$48, and below that is the word 'less cash' \$2. then a line drawn, and '96'. Now, I made out thousands of deposit slips, and going back to 1904 I haven't any recollection any more than what the memorandum there on this deposit slip shows, as far as the front of it is concerned. On the back of the slip is a list of names. Opposite the names the figure 8 appears opposite each name, and there are twelve names with the figure 8 appearing opposite each one of them. Then a line is drawn and addition made, and 96 is the total. Then just below that there is another name and the figure 8 opposite that, and that appears to be subtracted from the total above, 96, leaving a net total of 88. This is in indelible pencil, and in my handwriting. As far as what constituted this, why, my best recollection is that it was a memorandum of moneys deposited in the Lewiston National Bank by some officer in the land office who had brought the money down to procure—was in the habit of bringing money down to procure drafts to send away to local newspapers for advertising fees, the amount paid by entrymen at the time of their original application. To bear me out in this, I have looked up their certificate of deposit register, and find there on the 25th day of April, 1904, there was a certificate

of deposit made to F. M. Roberts for \$151.70, and one to the 'Pierce Miner' for \$151.70; and to my knowledge I know that these were two local country newspapers nearest to the lands upon which people were filing in that locality, and the custom was sometimes to draw certificates of deposit individually, or at times to lump the whole sum and make out one certificate of deposit, and especially so if there was a large number of filers on any one day, the whole sum would be lumped by the land office officials, and one certificate made out. * * * I will say further that it was a common practice in the bank and for myself to use a blank deposit slip in the bank to make my memorandums on. People ordering drafts or anything, I would use a blank deposit slip to make my memorandums on, and those would not be crumpled up and thrown away, but would lie there, and very likely some depositor coming in later the slip would be used on the face in the proper place to make out the deposit; and from the fact that these certificates of deposit were issued to these newspapers for the land on the 25th, and the date of this deposit is the 26th, would show me that this deposit slip was used properly for Kittie E. Dwyer subsequent to its being used as a memorandum slip in making out the memorandums I have spoken of, which would have happened the day before; and that is the best of my recollection on the subject.' (Page 2763 of the record.)

(Here the witness reads the record of the Lewiston National Bank in relations to these accounts, as the same is made a matter of record in this cause.)

There is absolutely no evidence contradicting the evidence of the witnesses, and especially the refer-

ence to the checks, appearing on pages 4203-4204 of the record. On each of the checks appears, in the lower left-hand corner, the one appearing on page 4203: Defendants' Exhibit "V-2", Exp. C. Evans, just preceding the endorsement, Ed. L. Wiggin. On page 4204 of the record: Defendants' Exhibit "W-2" appears, Exp. C. D. Whitney, just preceding the endorsement, Ed. L. Wiggin. This is in the handwriting of William Dwyer, and was made at the time the checks were drawn.

It seems to us that the Court would hardly be justified in disregarding this positive evidence and the record evidence appearing from the books and documents offered, and adopt the view of counsel, which can only be sustained by inferences, surmises and conclusions drawn.

On page 36 of his brief is a reference and a discussion by counsel under the heading, "PERSONS SOLICITED BY KESTER, KETTENBACH AND DWYER WHO DID NOT MAKE ENTRY". The first name appearing in counsel's brief, page 36, is that of F. G. Morrison. It appears that the witness Morrison was highly prejudiced against the defendants, and on cross-examination, at page 1221 of the record, the witness testifies: That it was about 1902 or 1903 the conversation occurred; and on page 1222

the witness admits that he testified differently at the time he testified in this case than he did at the time he testified at Boise in the criminal case; that when he testified at Boise he never mentioned the name of Kettenbach, and he finally contends that he did say Kester and Billy, meaning Mr. Kettenbach, but when pressed for an answer, on page 1223 he states:

Q. You say now, Mr. Morrison, that he had the arrangement made with Kester and Billy?

A. Kester and Billy.

Q. Kester and Billy?

A. Yes, sir.

Q. You are sure of that?

A. I am sure of that.

Q. Then the stenographer took down your evidence wrong?

A. Over there I might not have said it.

Q. You might not have said it?

A. I might not have used Mr. Kettenbach's name."

And on page 1224 the witness testifies:

Q. You are not on very good terms with Mr. Dwyer, are you?

A. Well, I am not on kissing terms, or anything of that kind.

Q. You and Dwyer haven't been on very good good terms for some time?

A. Well, he would speak to me if I would let him, but I forbade him talking to me at all.

Q. When did you forbid him talking to you?

A. Oh, well, you heard me forbid him your-self once.

Q. Well, when was the first time?

A. Oh, five or six years ago.

Q. And you haven't been on good terms since you had some lodge troubles over there, have you?

A. Well, I wasn't in the lodge business at all, I told you before.

Q. You had trouble a long time ago?

A. It wasn't over lodge business that we had trouble over.

Q. Your wife and Mrs. Dwyer had some lodge troubles?

A. I never mixed in that at all. I wasn't in the house during the trial. I had nothing to do with it.

Q. But you haven't been on good terms with Dwyer for a good many years, have you?

A. No, nor I don't want to any more.

Q. You have no use for him?

A. No, not in the least.

Q. Do you think if he loses all his land that Kester and Kettenbach should lose theirs?

A. Well, I have nothing to say in regard to that business.

The witness also testifies that he had no trouble over lodge matters, and that this conversation occurred in the early summer of 1902 and that it was not earlier than 1902.

The witness Kittie E. Dwyer, on page 3427 of the record, testifies that she, the witness, Frank G. Morrison, and his wife, Mrs. Morrison, were members of the same fraternal order or lodge in 1901:

"MR. TANNAHILL.—Q. I will ask you if you and Mr. Dwyer and Frank G. Morrison had any trouble in that order?

A. We did.

MR. TANNAHILL.—Q. What order was it?
A. In the Rebekahs.

Q. Have you anything—any record—by which you can fix the date—about the date—that trouble occurred?

WITNESS: I have a Past Noble Grand's receipt.

Q. Will you produce it, please?

A. There was something that Mr. Morrison said about me, and we have never been on speaking terms since. (Handing document to Mr. Tannahill.)

Q. This certificate is signed by Nellie S. Ramsey, Secretary. Are you acquainted with her signature?

A. I am.

Q. And she was Secretary of the Lodge at that time?

A. Yes, sir, she was.

Q. And this was issued July 4th, 1901, the day it bears date?

A. I think it was. The seal of the lodge is on it.

Q. And you was Noble Grand up to the 30th of June, 1901, as stated in this certificate?

A. I was.

MR. TANNAHILL: We offer this certificate in evidence and ask that it be marked the proper exhibit. * * *

Said document was thereupon marked by the Reporter as Defendants' Exhibit J-1, (appearing at page 4174 of the record).

“Mr. Tannahill.—Q. Now, was it before or after this certificate was issued that you had that trouble?

A. It was during the term of office, in the month of April. My term commenced on January 1, 1901, and ended June 30, 1901.

Q. And it was in April when this trouble occurred?

A. Yes, sir.

Q. Between Frank G. Morrison and Mrs. Morrison, and yourself and Mr. Dwyer?

A. Yes, sir; we have never spoken since.

Q. And Mr. Dwyer and Frank G. Morrison have not been on speaking terms since?

A. No, sir, not to my knowledge.

The evidence of Mr. Dwyer is to the same effect. He denies that he ever had such a conversation with Mr. Morrison, and states that he was not upon speaking terms with Mr. Morrison at the time that Mr. Morrison states that he had the conversation with him.

There was never an entry of Frank G. Morrison's involved in this proceeding, and it is immaterial whether or not the conversation did occur, but, measured by the weight of the evidence, the credibility of witnesses, and the appearance of the witnesses upon the stand, we respectfully contend that the evidence on the part of the defendants in relation to this instance is decidedly in their favor.

JOHN. P. ROOS

On page 37 of his brief counsel for appellant refers to the eviednce of John P. Roos, who did not file upon a tract of land, but states that George H. Kester solicited him to file. The witness' evidence appears at pages 1209 to 1213 of the record, and on page 1211 states that the reason that he can remember the exact language used is that he has testified three or four times and that he is testifying now in accordance with what he testified before, as far as his memory goes; that his memory is nothing exceptional. On pages 1212 and 1213 the witness states:

Q. Did you ever make any statement to any Government officials?

A. Did I ever make a statement?

Q. Yes?

A. Just prior to the first time that I was taken to Moscow Mr. Johnson stopped me on the street and asked me to come to his office, which I did two or three days later. He asked me regarding the conversation that I had with Mr. Kester, and I told him there was no conversation; that I knew nothing at all about it; and he told me all that I knew, and I then told him the exact conversation, and he took it down on paper and wanted me to swear to it, or sign it, which I refused to do.

Q. Mr. Johnson first repeated the conversation to you; was that it?

A. He asked me regarding it, and I told him I knew nothing about it, and then he repeated it to me.

Q. And then he repeated it to you?

A. Yes, sir.

Q. And you are testifying now to the conversation that Mr. Johnson repeated to you?

A. I am testifying to the conversation I had with Mr. Kester.

Q. Answer my question: Are you testifying now to the conversation that Mr. Johnson repeated to you?

A. I am testifying to my conversation with Mr. Kester and not what my conversation was with Mr. Johnson.

Q. Didn't you just say that Johnson repeated the conversation to you, and told you all you knew about this?

A. He told me all regarding it.

Q. He told you all regarding it?

A. Yes, sir.

Q. Then he repeated this conversation with Mr. Kester to you, didn't he?

A. Along the same lines: perhaps not just exactly.

Q. And that refreshed your memory, didn't it?

A. No, sir.

Q. Your memory has been refreshed on this matter several times, hasn't it?

A. No, sir.

Q. But Johnson did repeat the conversation to you, didn't he?

A. *He outlined it.*

Q. Before you told him anything about it?

A. He outlined it and told me regarding it, but he didn't know the exact situation or anything of that kind, or condition.

Q. But he repeated the conversation to you in substance, didn't he?

A. Yes, I believe so, in substance.

Q. The same as you have testified to here?

A. Well, perhaps not the same as I am testifying to it here, but the same in substance.

Q. The same as you are testifying here to, in substance?

A. *In substance, yes, sir.*

Q. This was Miles S. Johnson who talked to you about this, was it?

A. Yes, sir. (Page 1213 of the record.)

It has always been a mystery to the defendants how Mr. Roos could have been so badly mistaken. His evidence was at all times at variance with that of Mr. Kester and Mr. Kettenbach, and Mr. Kester has testified that he had no recollection of having any such conversation with Mr. Roos, although he had talked with him at one time and asked him if he had taken a claim, and about what claims were worth; that Mr. Roos said that he wanted to get a better claim than that. But it is clear to us now how it occurs that he is so testifying. Miles S. Johnson was in the employ of the Government, and met him on the street called him to his office and detailed a conversation for him to testify to, and having heard that he and Mr. Kester had a conversation concerning the taking up of a timber claim, Mr. Johnson details this conversation, and in some man-

ner induced Mr. Roos to remember it that way. He wrote it out for him; wanted him to sign it and swear to it, but Roos refused to do that, but he actually went upon the stand and swore to it in that way. His evidence is false. Whether he knew it was false or not is immaterial, but it is certainly false for the reason that it is at variance with Mr. Kester, and Mr. Kester never at any time asked him to purchase his right. He knew that he could not sell his right, and he had no such conversation as the one related by Mr. Roos, and as detailed to Roos by Johnson.

As we have heretofore set forth, Roos did not file upon a tract of land; no land of the witness is involved in the proceeding, and it is immaterial whether his evidence is true or false; but, however that may be, the evidence on the part of the defendants far outweighs that on the part of the prosecution, much less is the same clear, positive, unequivocal and convincing.

Counsel in his brief, at page 37, refers to the evidence of Samuel C. Hutchins. We see little in the evidence of Samuel C. Hutchins to discuss. His recollection of what occurred is not very definite, is at variance with that of the defendants, and as Hutchins did not take a claim, and no land of the

witness Hutchins is involved in this proceedings, we do not feel called upon to enlarge upon his evidence here.

WENN W. PEFFLEY.

We next call the Court's attention to the evidence of Wenn W. Peffley, referred to on page 37 of counsel's brief. His evidence appears at page 1206 of the record, in which the witness testifies:

Q. What was that conversation?

A. I asked him regarding taking up a timber claim, having heard something about it, and he informed me that there was a party leaving in a few days and I could accompany them, and that it would clear me about \$150.00.

On cross-examination, at page 1208, the witness testifies that he applied to Kester to locate him on a timber claim.

Q. Mr. Peffley, I believe you said you went to Kester and asked him about taking up a timber claim?

A. Yes, sir.

Q. And he told you that there were some parties leaving in a few days?

A. Yes, sir.

Q. And then did you ask him about what you would be able to make out of it?

A. Why, I naturally would; I believe I did.

Q. And he told you that you ought to be able to make \$150.00 out of it?

A. No; he said definitely; he said, "It will be worth \$150.00 to you."

On page 1208 the witness testifies in relation to the evidence he gave at Boise in the criminal cases:

Q. I will ask you if you testified in substance as follows: "Question. I believe you said you went to Mr. Kester and asked him about it?" Answer. I met him on the street and asked him, yes, sir." "Question. And you asked him something about the value of the claims?" "Answer. Well, I asked him what we would get out of it in case we took claims." "Question. And he said it ought to net you about \$150.00?" "Answer. Yes, he said it would net us about \$150." Is that about the facts?

A. Yes, sir.

Q. You don't remember the exact language that was used either by yourself or by Mr. Kester?

A. No, I don't remember exactly the words that was said.

Q. But that is the substance of it?

A. He conveyed the idea that we would get \$150.00 out of it.

The Court will observe that counsel takes the position that Wenn W. Peffley was solicited by Kester to file upon a claim, while the witness testifies himself that he went voluntarily to Kester and asked Kester to locate him upon a tract of land.

We can see nothing in the evidence of Wenn W. Peffley inconsistent with that testified by Mr. Kester, and nothing that will bear out the contention

that Kester solicited Peffley to file upon a tract of land.

ANDREW J. SHERBURN.

On page 38 of counsel's brief he refers to the evidence of Andrew J. Sherburn, and contends that Mr. Dwyer solicited Sherburn to file upon a tract of land, the evidence of Mr. Sherburn appearing at page 1214 of the record, and the cross-examination of Mr. Sherburn appearing at page 1216 of the record, wherein the witness testifies:

CROSS EXAMINATION

Q. Dr. Dwyer is quite a fellow to joke, is he not, Mr. Sherburn?

A. Yes.

Q. As a matter of fact, he knew that you had lived here for a long time, didn't he, Mr. Sherburn?

A. Yes, sir.

Q. Knew that you were acquainted with the Register and Receiver?

A. Yes, sir.

Q. Knew that you had proved up on two claims before?

A. Yes, sir.

Q. And he knew that you was favorably known and stood reasonably well in the community?

A. It was surprising to me that he should ask me to do such a thing.

Q. I see. Well, as a matter of fact you knew that he did that more in a joke than in any other way, didn't you?

A. Yes, I think so.

Mr. Dwyer states that he made a similar statement to Mr. Sherburn, but that it was made in a joking way, and he never at any time desired that Mr. Sherburn file upon a tract of land, under an assumed name or otherwise. Then, there is no land of Mr. Sherburn's involved in any of these actions, and the evidence of the witness is wholly immaterial, even if Mr. Dwyer had solicited him to file upon a timber claim, under an assumed name or otherwise.

CLAIMS INVOLVING THE LAMBDIN ENTRY.

On pages 38-39 of appellant's brief is a discussion of the Lambdin entry. We have heretofore referred to this entry, and will not enlarge upon what we have there said, except to direct the Court's attention to the evidence of William Dwyer, appearing at page 2329 of the record, and that of George H. Kester, appearing at page 3160 of the record.

THE SHAEFFER ENTRY.

On pages 39 and 40 of appellant's brief is a reference to the Shaeffer entry. We have heretofore referred to this entry, and will not enlarge upon what we have there stated, except to call the court's attention to the evidence of George H. Kester, pages 3165 to 3166 of the record, in which the witness testifies:

A. Mr. Shaeffer came to me one day and said that he had been talking with Mr. Dwyer about getting a timber claim, and said that he hadn't the funds necessary to pay for the land, and wanted to know if I would loan him the money to pay for the land, and later he came in one day and said that it was time for him to prove up, and wanted the money to pay for the land at the land office, and I took his note for the amount that he would require, and either that day or the next day he came and handed me the final receipt from the land office for the purchase of the land, simply, I suppose, to hold as a sort of security for the loan; and within a short time after that I purchased the land from him, after looking the matter up and seeing what sort of a claim he had.

Q. Did you hear his evidence wherein he stated that you paid his expenses up to the land?

A. I never paid any expenses for him of the land; I remember that he used to get advances against his salary, he did on several occasions.

Q. His salary as janitor of the bank?

A. As janitor of the bank; yes.

Q. Did you ever have any conversation with him that you would give him \$100.00 for his right and you pay all expenses?

A. No, sir.

Q. Did you hear the evidence of Clarence Robnett wherein he stated that he overheard a conversation between you and Shaeffer, wherein he stated that you agreed to pay him \$100.00 for his right and him deed the land to you?

A. Yes, sir.

Q. Did you ever have any such conversation as that?

A. No, sir.

Q. When was it that the negotiations began for the purchase of the Shaeffer land, in relation to the time he made final proof?

A. After he had made final proof.

Q. And you agreed on the price, did you?

A. Yes, sir.

And you paid the purchase price?

A. Yes, sir.

Q. What disposition have you made of that land?

A. That land has been sold?

Q. Do you remember to whom it was sold?

A. I think that land was sold to the Potlatch Lumber Company.

Q. And you received the purchase price, did you?

A. Yes, sir. (Page 3167 of the record).

THE MARIS ENTRY

On page 41 of his brief, counsel refers to the entry of Carrie D. Maris. We have heretofore referred to and discussed the evidence in support of and against

the regularity of this entry, and will not enlarge upon what we have there stated, save and except to call the Court's attention to the evidence of George H. Kester, appearing at page 3167 of the record, and the evidence of William Dwyer, appearing at page 3333 of the record. On page 3167 the defendant Kester testifies:

Q. What do you know, if anything, concerning Carrie D. Maris acquiring title to a tract of land?

A. I know nothing whatever about her acquiring title to the land, and the first that I had to do in any respect with that land was when Robnett came to me one day at the bank and said that he had a claim up there the other side of Pierce City, near the forest reserve, that he had been offered \$1,500.00 for, by Mr. Cameron, I think he said, and that he had been holding the land for \$1,600.00, that it was a pretty good claim, and he felt that it was worth more than \$1,500.00, and that he didn't want to sell it for \$1,500.00, but that he felt like he had to sell it, and wanted to know if I wouldn't look the matter up and see if I couldn't pay him \$1,600.00 for it. And I think I called Mr. Dwyer up, I think I got in communication with Mr. Dwyer at Pierce City, and asked him to go out over that land and make a report as quick as he could on it. And he went out and looked the land over and came back and reported to me that it was a good buy at \$1,600.00; and I then told Robnett that I would buy the claim for \$1,600.00. He would have been very glad and willing to have sold it for \$1,500.00 if I wouldn't have paid him the \$1,600.00, as far as that is concerned, but I felt

that it was worth \$1,600.00, and I was willing to pay the \$1,600.00, and the transaction was closed, and that is the very first that I knew about it. * * * *

Q. Did you have any notice or knowledge of any prior agreement that he had for the purchase of the land before she made her final proof

A. No, sir.

In support of the evidence of Mr. Kester, Mr. Dwyer testifies to substantially the same state of facts relative to Kester's calling him up, asking him about the claim, his making an estimate of the timber thereupon, and his report to Mr. Kester. (Page 3333 of the record.)

In relation to the William B. Benton entry, appearing on page 43 of appellant's brief, the Joel H. Benton entry appearing on page 44, the Robertson entry appearing on page 48, the Ferris entry appearing on page 51, it is sufficient to say that these entrymen are in conflict with Robnett, and the only evidence in support of the charges in the bill in relation to these entries is the unsupported evidence of Clarence W. Robnett; and inasmuch as the defendants' evidence is supported by that of the entrymen themselves, we do not feel called upon to reply to counsel's brief in relation to these entries.

We have heretofore referred to the evidence in relation to the Hansen entry, appearing on page

54 of counsel's brief, the Waldman entry, appearing on page 57, the Little entry, appearing on page 60, the Herrington entry, appearing on page 63, the Pierce entry, appearing on page 67, the Bashor entry, appearing on page 68, the Long entry appearing on page 71 the John H. Long entry, appearing on page 73 the Benjamin F. Long entry appearing on page 75, the Morrison entry appearing on page 78, the Hyde entry appearing on page 79, the Ferris entry appearing on page 81, the Robertson entry, appearing on page 84, and the Gammon entry appearing on page 88, all of appellant's brief, and we do not feel called upon to add to what we have heretofore said. It is sufficient, however, to state that the entrymen are all in conflict with the witness Robnett, and the only evidence in support of the charges of irregularity or fraud in relation to these entries is the unsupported evidence of the star witness Clarence W. Robnett.

Robnett says that he made an offer to and did sell these lands to the defendants. That prior to making the sale he told the defendants of the manner in which he acquired the lands, the irregularity in the proceedings, and the prior agreements with the entrymen. It is unreasonable to suppose or presume that Robnett was trying to sell these claims to

the defendants, and trying to obtain the best price he could for them ,and would, at the same time, tell the defendants of irregularities, fraud and prior agreements in relation to the acquisition of title to the lands. We do not believe the Court will be inclined to lend any weight to the evidence of Robnett in support of the various charges.

See evidence Robnett p. 2338-2339-2340-2341-2342. On page 2639 Robnett admits that he testified in the first criminal cases and his evidence is the reverse of what it is here, also p. 2521-2551 to 2636 of the Record.

SUMMARY OF EVIDENCE CONCERNING THE ROBNETT GROUP.

From page 91 to page 100 of appellant's brief is an argument under the heading "Summary of Evidence concerning the Robnett Group."

We have heretofore presented our argument concerning the Robnett entries, and do not feel called upon to enlarge upon what we have heretofore said. We, however, call the Court's attention to the fact that the only evidence as to irregularity in connection with the Pierce, Morrison, Hyde, Hanson, Little, Herrington, Bashor, the three Longs, Ferris, Lewis,

Gammon, Robertson, and Nelson entries, is the unsupported evidence of Robnett. . An examination of the evidence of Little, Lewis, Gammon, George Ray Robinson and others will show that the defendants purchased their claims with a great deal of reluctance. That each thereof applied to the defendants repeatedly in an effort to sell their claims, and were requested by the defendants to see other timber buyers and endeavor to sell to some one else. After repeated efforts, and giving options to various parties, they were unable to sell, and finally sold to the defendants.

In relation to the Maris entry, the evidence of Carrie D. Maris is that Robnett made repeated efforts to sell the land. The witness sat in the Directors' room of the Lewiston National Bank, heard Robnett call up Nat Brown from Moscow, a timber buyer, and other parties, in an effort to sell the land. It was some time after these repeated efforts that Robnett finally sold the land to the defendants.

Likewise the evidence is conclusive that after repeated efforts on the part of Robnett to sell the Hanson claim to other parties, it was finally sold to the defendants.

On page 95 counsel again departs from the record, and copies certain portions of the evidence given in another case. The lower court decided the case upon the evidence as he found it in the record, and not upon the imagination that some state of facts other than that appearing from the record. Then, it is no offense to make a hazardous loan and receive a bonus therefor for taking the chance, if the borrower is willing to pay the bonus, and the party who loans the money is willing to take the chances. None of this money went to Kettenbach. In a few instances where loans were made for his relatives, the money went to the relatives. In other instances it is not clear who received the bonus, and it is not unlikely that a portion of the same, or all thereof, went to Robnett.

THE EMERY AND COLBY GROUP.

We have heretofore referred to this group of entries, copied at length in this brief the evidence of Colby, Emery, Kester and Kettenbach, and believe that the same is sufficient to overbalance the unsupported evidence of Robnett.

On page 114 of appellant's brief is a reference to the Cornell entry. As we have heretofore stated, it

is a question whether the Court will believe Cornell, under existing conditions, and in view of the fact that he exhibited such a high degree of prejudice against the defendants, when his evidence is impeached by that of William Schultz and of Ab Masters, or whether the Court will believe George H. Kester, whose evidence in relation to this entry appears on pages 3161 to 3164 of the record, and William Dwyer, whose evidence appears at page 3330 of the record. Then, this claim has long since been sold to an innocent purchaser, without notice of any irregularity, if any such did exist.

On page 121 of appellant's brief appears a reference to what is termed or called "The Line-up." The evidence of Dwyer in relation to this matter appears at pages 3308-3316 of the record. On page 3307 the witness details the manner in which the lands were cruised, and on page 3308 the witness testifies that certain lands which he had cruised were covered with Skuse scrip—scrip laid by J. J. Skuse—and the lands the witness went to select for the State were covered with this Skuse scrip; and this State selection was made in 38-5, East. That the instructions from Mr. Goldsmith, under whom the defendant Dwyer was working, were that he should select land in a body to be covered with the

State's filings, and these selections were made in 38-5, East; and at the bottom of page 3309 the witness testifies that he furnished Mr. Goldsmith with the minutes and the estimate of the land for the purpose of the State's filings; and on page 3310 he testifies to the manner in which this land was covered with Stone and Timber filings, in which he testifies:

"Q. Now, what subsequently became of that land.

A. Why, I filed timber and stone——

Q. Just wait a minute. Was this scrip—this Skuse scrip—who was it laid that scrip?

A. S. P. Fitzgerald.

Q. Now, was that land taken by the State?

A. No, sir.

Q. Now, did Kester and Kettenbach lay any scrip in this same township, subject to the State's rights?

A. Not in that township. They did in 39-5, and 40-6.

Q. And did you cruise that at the same time?

A. No. Mr. Lafferty cruised that.

Q. Lafferty cruised that?

A. Yes, sir.

Q. And did the State select the lands that were filed on—that the scrip filings covered, or Kester and Kettenbach subject to the State's rights?

A. Yes, sir.

Q. Now, what subsequently became of this land that was filed on that was covered by the Skuse scrip?

A. Why, I filed timber and stone entries over it.

Q. Now, can you name some of the people that you located on that land?

A. Why, I located Mr. and Mrs. Hopper, I think, Miss Elizabeth Kettenbach, Mrs. White, Jackson O'Keefe—well, there are some more, but I can't recollect who they are.

Q. And that same land you had furnished Mr. Goldsmith with the minutes of it and your estimate of it for the State to file on before?

A. Yes, sir.

Q. Now the people that you located on that land, how did they come to file ahead of the Skuse scrip?

A. How did they?

Q. The Skuse scrip, as I understand you, was laid before the land was subject to entry, but laid subject to the State's rights. Now, how did the stone and timber claims come to be filed ahead of the scrip?

A. Why, the scrip was rejected, but if the scrip owner had got in ahead of the timber and stone entrymen and reapplied for that land, why he would have what they called kept the scrip alive: they couldn't reject it after the State's right had been exhausted; the first one that came with the application got the land, either the timber and stone, or you could have put the scrip on it if you wished.

Q. Did you hear the evidence of the witness Joseph H. Prentice, of Clarkston, that he was fifth in line, and S. P. Fitzgerald offered him \$500.00 for his place in the line?

A. Yes, sir; I was there.

Q. Was that the same S. P. Fitzgerald that laid this Skuse scrip?

A. Yes, sir. He sent another man there to break through the line. He sent a man by the name of Kays the same day.

Q. And as I understand you to say, you had cruised that land before you went up there with Mr. Goldsmith?

A. Oh, yes; I had worked in there a couple of years.

Q. Did you hear the evidence of J. C. Jansen relative to the timber on a portion of this land, or that the State could have gotten better land than it got in this section?

A. Yes, sir.

Q. What have you to say about that?

A. Why, he don't know what he is talking about.

Q. And you was in that country when Jansen claims that he was in there and cruised this land?

A. In the winter of 1903 and 1904?

Q. Yes.

A. That was the winter that we was working for the State. We never saw a track in there—not a mark—never met a homesteader."

It thus appears from the evidence of Mr. Dwyer and the land office records showing the filing of this Skuse scrip, that this land was originally cruised and the minutes furnished the officers in charge of the State's selections, and it was supposed they would select that land. That the witness had cruised other lands upon which scrip was laid for Kester and Kettenbach, subject to the State's rights. That the State finally came and selected the land upon which Kester and Kettenbach had laid the scrip, and did not take the land which Mr. Dwyer

had cruised for the State, and of which he had furnished the officers the minutes. That upon this land scrip was laid for John J. Skuse by S. P. Fitzgerald, who offered Joseph H. Prentice \$500.00 for his place in line. If counsel's contention that the land upon which the timber and stone entrymen filed is the best land, it is clear that if the timber and stone entrymen had not held their places in line, and filed their timber and stone entries upon it, that it would now be in the hands of the Timber Trust, where it appears that the officers in charge of this prosecution are seeking to place it. It seems to me that it was the Timber Trust which tried to, and did, work the State's officers—and by this I do not mean Mr. Goldsmith, but the officers who had in charge the filing upon the State's lands, Mr. Jackson and Mr. Lafferty. We do not charge this was done, but the record convinces us that no consideration was shown defendants—but consideration was shown Fitzgerald, who had charge of the Skuse scrip.

On page 124 of appellant's brief is another reference to the line-up at the Land Office, and on page 125 appears the names of twenty-five entrymen who, it is claimed, appeared in that line-up. Out of these twenty-five it appears that the defendants have not purchased the claims of Geo. H. Kester, Elizabeth

Kettenbach, Elizabeth White, William J. White, Mammie P. White, Martha E. Hallett, or Edna P. Kester. That the claims of Hattie Rowland, and of Frances A. Justice were purchased by Kittie E. Dwyer, leaving only ten of the claims that were purchased by the defendants Kester and Kettenbach; and we call the Court's attention to the evidence of Joseph M. Molloy, appearing at page 2014 of the record, wherein it appears from undisputed evidence that there were in line forty-two entrymen. The defendants could not have been doing a wholesale business in the matter of purchasing claims, notwithstanding the fact that Dwyer obtained a location fee from the most of them.

We respectfully submit that the conclusions drawn by counsel that this line-up was organized by the defendants for the purpose of purchasing the claims, and that a prior agreement existed with each thereof, is far-fetched, unwarranted by the undisputed evidence, and unsupported by any fact or circumstance in the case.

At the bottom of page 125 of appellant's brief counsel makes the broad statement that each entryman was induced to make the entries, either by Kester, Kettenbach, or Dwyer, personally, or by their agents. We inquire what evidence thereis that the

defendants induced Jackson O'Keefe to make the entry, or Charles W. Taylor, or Joseph H. Prentice, or Edgar J. Taylor, or Edgar H. Dammarell. It appears that O'Keefe applied to the defendants, and especially to Dwyer, to locate he and his nephews upon a timber claim.

George H. Kester filed upon a timber claim himself. The evidence of Guy L. Wilson and of Ella Wilson, his wife, is that they went to Dwyer's home and asked Dwyer to locate Mr. Wilson upon a timber claim. The same condition appears in relation to the entry of Frances A. Justice. She induced Dwyer to locate her upon a timber claim, and paid him a location fee. The same condition appears in relation to Elizabeth Kettenbach, Elizabeth White, William J. White and Mamie P. White and Martha E. Hallett, Daniel W. Greenburg, David S. Bingham, Hattie Rowland and William McMillan. There is absolutely nothing to justify the statement that the defendants induced these entrymen and entrywomen to file upon a timber claim.

Likewise the statement on page 126 of appellant's brief, where counsel states that Martha E. Hallett and the kinsfolk of Kester and Kettenbach still hold the title to the entries made by them, for the benefit of said defendants. This assertion is unsupported

by the evidence, and is contradicted and refuted by the evidence of the entrymen and entrywomen themselves.

On page 169 is a reference to the evidence bearing upon all of the entries in the line-up. We call the Court's attention to the evidence of J. M. Molloy, appearing at page 2014 of the record, for the purpose of showing that counsel has not referred to one-half of the entrires of the parties in the line-up; and again repeat that there are very few of the entries in the line-up which were purchased by the defendants Kester, Kettenbach and Dwyer.

On the same page of appellant's brief is a reference to the deposit slip offered in evidence, and a discussion of the evidence in support of the same, which we have heretofore considered, and our discussion and argument and copy of the evidence appears elsewhere in this brief, and we will not enlarge upon what we have there stated.

On page 174 is a discussion under the head of "Evidence Concerning the O'Keefe Group and the Kester, Kettenbach and Dwyer Group ("The Line-up").

We do not care to enlarge upon what we have heretofore stated concerning this matter, but call the Court's attention to the evidence of William

Dwyer, appearing at page 3319 of the record, as well as the evidence of Frances A. Justice, wherein it appears that David Justice, husband of Frances A. Justice, went to the land for the purpose of examining the same and taking a timber claim. That the timber was not of a good quality, as he viewed it, and he therefore did not take a timber claim. This is a circumstance showing that the contention of counsel is unfounded in fact, and strongly supports the evidence of the defendants and the witnesses who have testified in their behalf. If there had been a prior agreement for these various entrymen and entrywomen to sell their rights, and to take up a piece of land and transfer it to Kester and Kettenbach for a specified sum, what difference would it have made to David Justice whether or not the timber was valuable? He would have taken the land just the same. But in view of the fact that he did not consider the timber sufficiently valuable to pay him to take a piece of land, pay the purchase price, and pay Dwyer a location fee, and did not take a claim, it is a circumstance which strongly supports the evidence of the defendants that no fraud or irregularity existed in the acquisition of title to the land.

On page 177 of appellant's brief is a discussion under the heading of "Kester and Kettenbach secure

appointment of Dwyer to assist in making State selection in said Township." This assertion is based wholly and entirely upon the unsupported evidence of Clarence W. Robnett, which is contradicted, impeached and denied, not only by the evidence of each of the defendants but by that of Goldsmith. On page 3268 of the record Mr. Goldsmith testifies concerning the evidence of Clarence W. Robnett wherein Robnett testified that Mr. Kettenbach called Mr. Goldsmith into the bank and said to him:

"A. * * * 'Mr. Goldsmith, what I sent for you for was to see if we couldn't arrange to appoint Mr. Dwyer as one of your selectors to cruise the timber and make the selections for the State,' and Mr. Goldsmith says, 'Well, I really don't know how I can do that, but I will see.'

Q. Did you have any such conversation as that?

A. No, sir; I did not."

In response to the other statement made by Robnett, Mr. Goldsmith testified as follows Page 3268 of the record:

"A. Well, he said Mr. Dwyer was out of the State, and there might be objections to it, and he thought that perhaps already there had been people spoken to by Mr. Jackson for that position, but if he could arrange it he would do so.

Q. Did you have any such conversation as that with Mr. Kettenbach?

A. No, I didn't. I employed Mr. Dwyer on my own responsibility, on Mortz' recommendation."

On page 3269 is another reference to the evidence given by Robnett, wherein Robnett stated that Kettenbach stated to Goldsmith as to Dwyer being a resident of the State of Washington, which is across the line, and Clarkston was practically the same as Lewiston, and that Dwyer was operating up in the timber, and that would not be any reason why Goldsmith should not get a man across in Clarkston, to which Mr. Goldsmith answered:

“A. No, sir; that is absolutely false—absolutely false.”

On page 3270 is also the evidence of Mr. Goldsmith contradicting that given by the witness Robnett.

On page 3316 appears the evidence of William Dwyer, wherein he denies that he ever had any conversation with Mr. Goldsmith or with Mr. Kettenbach concerning his appointment as State Land Selector, and details how he came to be appointed, and in response to the following question:

“Q. I will ask you, Mr. Dwyer, if you ever at any time made any suggestion to Mr. Goldsmith that he leave out any particular lands for the purpose of enabling you to locate timber and stone entrymen upon them?

A. No, sir I never did.

Q. And did you leave out any valuable lands for that purpose, or for any other purposes, when you was cruising the land for Mr. Goldsmith?

A. No, sir. He had a record of all the lands that was cruised, excepting this plat of 39-4 here.

Q. And you worked under his directions all the time?

A. Yes, sir." * * *

On page 3317 appears the evidence of Mr. Dwyer that his selections were afterwards checked over by the State, and that no objection was found to them, and that they contained the most valuable land of any selections ever made by the State.

The argument and contention of counsel in relation to the securing of the appointment of Dwyer, so as to enable the defendants to make the State land selections, and better facilitate the filing of timber and stone entrymen thereupon, is unsupported by the evidence, and we do not believe the Court will feel that it should take or accept the unsupported evidence of Clarence W. Robnett in relation thereto.

KESTER'S ATTEMPT TO INFLUENCE ACTION OF CHIEF CLERK OF LAND BOARD.

On page 180 of appellant's brief is a reference to the evidence of Mr. Jackson, which was read into the record over the objection of the defendants, and which now appears in the record, it not having been taken in accordance with the statute for the taking of such deposition, but, however that may be, there is no evidence which justifies the statement of coun-

sel that Kester attempted to influence Mr. Jackson. Kester's version of his meeting Mr. Jackson is set forth at page 3175 of the record, and is a full and complete explanation of any inference which might be drawn from Mr. Jackson's statements.

It appears that Fitzgerald, Skuse, and other well-known representatives of the Timber Trust, did influence Mr. Jackson, and induced him to leave out of the State's filings what counsel now contends was the most valuable land, and induced him to select for the State those lands upon which Kester and Kettenbach had offered scrip, and left what counsel contends were the best lands for the Timber Trust, and scrip was laid upon those lands by Fitzgerald, acting for Juhn J. Skuse; and when this was brought to the attention of Dwyer he then arranged the line so that the parties whom he had taken to the land, and who had agreed to pay him a location fee, could file on the land which was covered by the rejected Skuse scrip, and which Fitzgerald made such a desperate effort to re-lay before the Timber and Stone entrymen could have an opportunity or a chance to file.

In view of the circumstances, counsel's argument will certainly find as little favor with this Court, as it did with the lower Court.

DWYER CONTESTS.

On page 181 of appellant's brief is a reference to certain contests filed by the defendant William Dwyer.

We have heretofore stated that Dwyer was a timber cruiser; had gone in and cruised out certain lands; the manner in which the cruising was done; that he had arranged to locate certain Timber and Stone entrymen upon the lands for a consideration, in some instances \$100, and in some instances \$200.

On page 3362 of the evidence of Dwyer appears a reference to the homesteads which were filed, and that these homestead entrymen were conducted to the land in charge of Fitzgerald and one Jensen, and on page 183 of appellant's brief is a reference to the entries of Walter Williams, Albert J. Flood, William R. Lawrence, and others. A reference to the evidence of T. H. Bartlett, Register, page 3053 of the record, appears the affidavit of Walter Williams in which he states, under oath, that he made settlement upon the land March 15, 1903. On page 3055 of the record appears the affidavit of Albert J. Flood, wherein he states, under oath, that he made a settlement upon the land on the same date. On page 1028 of the cross-examination of Walter Williams, it appears that he testified when upon the stand as follows:

“Q. When did you go upon this land, Mr. Williams?

A. Well, sir, I couldn't say the exact date; it was just a little while before we filed.

Q. How long before you filed?

A. I couldn't say exactly. It couldn't have been over a couple of weeks, though, I don't think.”

The filing papers show that he filed on the 24th day of February, 1904.

On page 1014 of the record the witness Albert J. Flood testifies:

Q. As a matter of fact, you had not resided there 60 days, had you?

A. No.

Q. You had only stayed overnight there?

A. That's all.

Q. And you don't know whether you stayed on your claim or Walter Williams'?

A. Oh, yes; I knew the numbers of the land where I was in.

And on page 1015 the witness Flood testifies that he intended to change his homestead filing to a Stone and Timber. That he filed a homestead on it to defeat the State's rights; and on page 1013 the witness testifies, in substance, that he knew it was necessary to make an affidavit that he had established a bona fide residence upon the land, and had resided there for more than sixty days prior to the time the land was subject to entry, in order to defeat the State's rights. His affidavit was false. As Mr. Dwyer had

cruised out this land, and had arranged to locate Timber and Stone entrymen upon it, he did not consider that it was right or just for Skuse, Fitzgerald, Jensen and others to induce entrymen to make a false affidavit, that they had established a bona fide residence upon the land and had resided there for more than sixty days prior to the time the land was subject to entry, in order to defeat the State's rights and also defeat Mr. Dwyer and the many Timber and Stone entrymen who had agreed to pay a fee for being located upon the land.

On page 3056 Mr. Bartlett testifies:

"MR. TANNAHILL—Q. Mr. Bartlett, I show you a list of the homestead filings that were made in the United States Land Office February 24, 1904, and ask you to examine it and tell us how many of those made proof, homestead proof.

A. The only entrymen who made homestead proof were Thomas J. Root, of Orofino, Idaho, for the east half of the northwest quarter, the northwest quarter of the northwest quarter of section 27, the northeast of the northeast of section 28, township 40, north, range 5 east; and Thomas L. Harris, of Orofino, for the south half of the northwest quarter of section 25, and the southeast of the northeast and the northeast of the southeast of section 26, township 37 north, range 3 east.

Q. I will ask you if you have examined your records to ascertain whether or not the entrymen named on this list, named Ferdinand Roos,

Jr., and concluding with the name Anton Wholen, are homestead entrymen who made their entry February 24th, 1904, according to the records of the land office.

A. I haven't examined the records with the view of ascertaining when these entrymen filed, as to whether they made proof or not.

MR. TANNAHILL: This is the one we stipulated on up there, Mr. Gordon, at the time I furnished you the list of the timber and stone entries that Joe Molloy identified. He identified these as the homestead entrymen.

MR. TANNAHILL: We offer in evidence the list of homestead entrymen referred to by the witness, designated as list of homestead filings made in the Lewiston land office February 24, 1904, beginning with the name Ferdinand Roos, Jr., and concluding with the name Anton Wholen.

Said list was thereupon marked by the Reporter as Defendants' Exhibit No. 5A."

This list appears at page 4164 of the record, and aggregates fifty-four homestead entrymen. On cross-examination the witness testifies:

"Q. What became of those entries upon which the proof was not offered? Were they subsequently entered by the same people under timber and stone entries?

A. Some of them were. I have marked those entries that were thus entered with T. & S., and the date the proof was made.

Q. Were they by the same persons?

A. By the same people; yes."

It thus appears that it was not the defendants who were seeking to defraud the State, and who were

seeking to defraud the honest Timber and Stone applicants, but it was Fitzgerald, Skuse and Jensen who induced these people to make a false affidavit for the purpose of subsequently relinquishing the land and filing Stone and Timber entries thereupon, or relinquishing so that the Timber Trust, by its representative, John J. Skuse, could lay scrip thereupon.

On page 217 of appellant's brief appears a discussion of the records of the Lewiston National Bank in reference to the account of Harvey J. Steffey, and wherein Steffey drew checks upon his account for the payment of the purchase price of the land; and on page 218 of appellant's brief is set forth the record of the bank in relation to the various notes given by Steffey and the condition of his account. If this evidence proves anything, it proves that Steffey drew checks upon his account for the payment of the purchase price of these lands; that from time to time his account was overdrawn; that he gave notes to cover his overdrafts; that when a settlement for the claims was made the money was deposited to Steffey's account, and that he received the full amount of the purchase price named as a consideration in the deeds. There is also a reference to certain notes taken up by Kester and Kettenbach. The evidence

also shows that on December 28, 1907, a check was charged against the account of Kester and Kettenbach for the same amount for which the Steffey notes were given, \$3979. With regard to this transaction, Mr. Kettenbach in explanation states that during the period that these loans were made to Steffey, the latter was the owner of two valuable timber claims, and, as such, had a certain rating with the bank for the purpose of securing loans, and his credit was deemed satisfactory to a certain extent. That this was perfectly good business, and that Mr. Kester and Mr. Kettenbach, by virtue of their positions, in the bank, were justified in extending this credit. Mr. Kettenbach explains that after he and Mr. Kester retired from the bank, Mr. Frank W. Kettenbach, the then President, was not altogether satisfied with these Steffey loans, and to satisfy Mr. Frank W. Kettenbach, and to settle the matter up, Mr. Kester and Mr. Kettenbach simply bought up Mr. Steffey's paper, and paid for it, thus fully explaining the showing made by the books. Mr. Kettenbach further explains that Mr. Steffey subsequently sold his claims, thereby destroying his credit and failed to take up all of his paper, and that some of it is still unpaid, and Mr. William F. Kettenbach and Mr. Kester have charged it off to profit and loss.

Evidence of William F. Kettenbach page 3771-3774 of the record.

The incident simply illustrates that Mr. Frank W. Kettenbach's dissatisfaction with the loan was well-founded, and that Mr. Kester and Mr. William F. Kettenbach did a very creditable thing in taking off the bank's hands doubtful paper which as officers of the bank they had sanctioned. As the matter turned out, the bank would have suffered a loss had they not done so. Instead of permitting this to happen, they took the paper themselves and sustained the loss. The incident reflects very favorably on the character and integrity of Mr. William F. Kettenbach and Mr. Kester, and falls far short of bearing out the imputations which no doubt induced counsel for complainant to introduce this evidence.

AFFIDAVITS OF ENTRYMEN IN THE STEFFEY GROUP.

On page 223 of counsel's brief is a discussion under the heading of "Affidavits of Entrymen in the Steffey Group," wherein counsel complains that the defendants obtained affidavits from the entrymen as to the conditions under which they filed upon the land, and also refers to the defendants procuring affidavits

from Charles W. Taylor, Edgar H. Dammorrell, Edward J. Taylor and David S. Bingham. We feel that the officers in charge of the appellant's case are the last ones who should complain concerning the procuring of affidavits from entrymen and entrywomen. We will say, however, that the record does not show that we indicted entrymen, threatened to send them to the penitentiary, nor threatened with indictment those who were not indicted, and after getting affidavits and testimony dismissed indictments. All of the affidavits made for the defendants were made freely and voluntarily, and the defendants have just as much right to procure the affidavits of entrymen, or of anyone else, as has the appellant. There is nothing concerning the procuring of those affidavits which would subject the defendants, or anyone, to criticism, save and except, possibly, Harvey J. Steffey himself.

It seems to be the theory of counsel that the entrymen should not be believed, save and except when they testify favorably to the appellant. If the direct evidence of the entryman who appeared for appellant is to be considered their cross examination should also be considered. The entrymen understood that they had the absolute power of disposition over the lands themselves. They were satisfied

that they could sell to whomsoever they chose, and the mere fact that the defendants, being extensively engaged in the timber business, purchased large numbers of these entries in the open market, merely goes to show that they paid the best price that the entrymen were able to realize, and has certainly little weight, if any, in establishing that prior agreement which is denounced by the statute. In a large majority of cases the defendants did not want to purchase the lands; turned the entrymen away; asked them to endeavor to sell to other timber buyers, and after repeated efforts, being unable to make a sale, the entrymen would return and then sell to the defendants. Timber land at that time was of but little value. It was not considered a profitable investment. The purchaser took chances on the timber being destroyed by fire; took chances on holding it for a number of years before being able to sell it again, and many things entered into consideration which made timber lands unsalable. It was not necessary for the defendants to violate the law in order to purchase timber lands at a very low price. Such lands were offered for sale every day. There was more land offered to the defendants than they were able to buy, and, in view of the conditions existing at the time, it is improbable to believe that

the defendants and all of the entrymen, who are good citizens, are guilty of violating the law, and it is unreasonable to suppose that these men and women who appeared and testified for the appellant—that they had no agreement prior to filing their sworn statement, or at the time they made their final proof, for a sale of their lands,—have sworn falsely.

As to all of the cases where the entrymen are continuing to hold their lands, with no desire or attempt to dispose of them, counsel contents himself by saying that they are holding the same in trust for the defendants Kester, Kettenbach and Dwyer. It is exceedingly easy to make these sweeping assertions, but the Court, we feel, will not be slow to recognize from the evidence that there is nothing to justify them, and that they are unjust, unfair, and without merit. We have yet to find a case which holds that there is anything illegal in purchasing large tracts of timber in the open market, and paying the highest market price therefor, but counsel for appellant, to judge from his brief, would have us believe that the mere acquisition of a large tract of land by the defendants is suspicious *per se*, and starting with that premise, by skillfully misinterpreting little acts and words, by a system of specious

theories and unjustifiable deductions, he would make innocent acts appear wrongful, honest ones as dishonest, and that the whole course of action of the defendants in acquiring these timber lands was characterized by fraud and wrong. Such a frame of mind and feeling of heart must give counsel for appellant but little sympathy with the decision of this Court in *United States vs. Barber Lumber Company*, 194 Fed. 24, wherein Judge Bean, in writing the opinion in the lower court, says:

“It is just as reasonable and certainly more just to suppose that the entrymen and entrywomen in making the applications to purchase, acted, as they each testified, honestly and in good faith, than it is to conjure up some contrary theory, which necessarily assumes that all the witnesses in this case upon that question perjured themselves on the trial.” (172 Fed. 948, at page 955).

An examination of the testimony convinces us that the appellant's case is founded on three principal sources of evidence: (1) The testimony of Clarence W. Robnett, a man whose record convinces that he stoops at nothing to further his own nefarious purposes; a man to whom lying, deceit, false oaths and perjury are but his ready stock in trade if their use but serves his purposes; a self-confessed perjurer and defaulter, and one whose testimony is certainly entitled to the minimum weight, and especially so

when it becomes apparent that his testimony was unquestionably induced by the hope of immunity, not only under an implied but a direct agreement that he would be released from the penalty of his many crimes, which understanding and agreement was carried out, and from which crimes he was released and pardoned.

(2) The testimony of Harvey J. Steffey, whose evidence is equally unworthy of belief; who admits that he committed perjury, that he committed subornation of perjury, that he violated the land laws, and that he committed other offenses in relation to the acquisition of title to timber lands.

(3) The testimony adduced under the persuasive influence of certain special agents through the medium of coercion and the threat of direful consequences if the particular testimony desired were not forthcoming, and the testimony produced by reason of the indictment of various witnesses, and holding those indictments over them until after they had testified and their evidence was made a matter of record, and by threat of indictment in other cases.

Using as a basis the testimony procured through these three sources, counsel for complainant indulges in an elaborate argument based thereon, but his argument is of little value when the fallacious

character of his premises is considered. We submit that the testimony, taken as a whole, falls far short of supporting the premises of counsel's argument, which, starting with false premises is elaborated by a system of gratuitous and unwarranted assumptions, inferences and theories.

A fair sample of the views which counsel for complainant would urge upon this court is that wherein he would urge this court to disregard the testimony given by the Government's own witnesses on their cross-examination, and would have the Court believe that their testimony on cross-examination is unworthy of belief and should not be considered.

To a similar argument advanced in the case of *United States vs. Barber Lumber Company*, 172 Fed. 948, the Court says (at page 962) :

"It is insisted that the entrymen and entrywomen who have testified in this case, although called as witnesses by the Government, were hostile to it, and that their testimony should therefore be disregarded or viewed with suspicion, but there was no particular hostility manifested by any of these witnesses, unless it is due to the fact that their testimony does not support the averments of the bill. The Government was, of course, not concluded by their testimony, but it cannot insist that they are unworthy of belief or that their testimony should be entirely disregarded and the facts found by the court to be contrary to what these people

have testified to without some evidence upon which to base such a conclusion. The testimony was competent, and, unless self-contradictory, or inherently improbable, it must necessarily prevail in the absence of contravailing evidence."

Counsel's own argument is an admission of the unsatisfactory nature of the proof adduced by the Government, so counsel lays great stress on little things, and from them, by inferences and conclusions, endeavors to build up a case. But in so doing counsel runs counter to a mass of weighty decisions, all holding that patents of the United States will not be cancelled on any proof short of that proof which is clear, satisfactory and convincing.

We have cited all the leading decisions on this question of cancelling patents, and we would here simply respectfully refer the Court to them, with a feeling of confidence that the proofs shown by the record in this case fall far short of the degree of proof required by those cases to entitle complainant to the relief sought in this proceeding. As stated by Mr. Justice Brewer in *United States vs. Stinson*, 197 U. S. 204, 49 Law Ed. 725, quoting from the Maxwell Land Grant case:

"It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

We inquire as to whether or not the evidence of Clarence W. Robnett is that class of evidence which commands respect? We have heretofore called the Court's attention to various pages of the record of the evidence of Robnett, especially pages 2353 to 2396 and 2646 to 2651, wherein Robnett refused to answer question on cross-examination, for the reason that his answers might incriminate him. He willingly answered questions for the appellant, and did not claim his privilege, but when we attempted to cross-examine him upon the same matters he claimed his "constitutional privilege," as he called it, and declined to answer. This was sufficient ground for suppressing his deposition, or his evidence, as the same is properly termed, but we did not move against it upon that ground, but contented ourselves with permitting it to remain in the record, calling the Court's attention to the same, and asking the Court what respect this evidence is entitled to, where a complainant in a court of equity in a case requiring clear proof produces as a main ground of recovery a witness who refuses to submit himself to a cross-examination upon the ground that if answers to questions were given they might incriminate him, a witness who embezzled from some of defendants and admits he is contradicting previous

testimony and is doing so with hope of immunity. That is the character of evidence we are required to meet, and upon which the Court is asked to base its decree cancelling the patents to the timber lands set out and described in the bills in equity on file herein, in the face of contrary verdict of a jury and of a contrary decision of the court below.

We feel that the record in this case is now sufficiently voluminous, and we have no desire to further swell its pages by endeavoring to summarize it further in closing. We are satisfied that a careful study of the evidence, as a whole, shows clearly that the charges of the complainant's bills have not been sustained by the proof, and that the theories and desperate efforts of counsel for complainant to show that a crime was committed where in fact there was no offense are not supported by the evidence.

POINTS AND AUTHORITIES.

I.

In order for the complainant to succeed, it is necessary to prove fraud in connection with each and every entry by clear and convincing testimony, and the mere fact of transfer of title before the issuance of patent raises no presumption of unlawfulness or fraud in the original entry.

II.

In a suit by the Government to cancel patents to public lands, the evidence on the part of the Government must be clear, convincing and unequivocal. It must be stronger than beyond a reasonable doubt. This rule has been announced in a number of cases, and the fact that the jury in a criminal case involving the same matters, and based upon the same evidence, has found adversely to the Government, and the trial judge in the civil case has found adversely to the Government, is a very strong indication that the evidence in this particular case is not clear, unequivocal and convincing.

In support of this point we call the Court's attention to the following authorities:

United States vs. Maxwell Land Grant Company, et al., 121 U. S. 325; 30 L. Ed., 949, in which the Court says:

"While courts of equity have the power to set aside, cancel or correct patents or other evidences of title obtained from the United States by fraud or mistake, and to correct, under proper circumstances, such mistakes, this can only be done on specific averment of the mistake or fraud, supported by clear and satisfactory proof." (Syllabus 4.)

United States vs. Stone, 69 U. S. 525-527; 17 L. Ed., 765, in which the Court says:

“A patent is the highest evidence of title, and is conclusive as against the Government and all claiming under junior patents or titles, until it is set aside or annuled by some judicial proceeding.”

United States vs. Stinson, 197 U. S. 200-204; 49 L. Ed. 724. At page 725 (L. Ed.) Mr. Justice Brewer says:

“While the Government, like an individual, may maintain an appropriate action to set aside its grants, and recover property of which it has been defrauded, and while laches or limitations do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. 1. The respect due to the patent. The presumption that all proceedings and steps required by law have been observed before its issue. The immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by the proof.” (Citing authorities.)

“2. The Government is subject to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend a prosecution of a like action by an individual.”

Quoting from *Maxwell Land Grant* case (supra): “It should be well understood that only that class of evidence that commands respect, and that amount which produces conviction, shall make such attempt successful.” (Citing authorities.)

In *Colorado Coal & Iron Company vs. United States*, 123 U. S. 307, 31 L. Ed. 182, (at p. 186, L. Ed.,) Mr. Justice Matthews, after citing approvingly the Maxwell Land Grant Case (*Supra*), says:

"It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the Government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish."

The doctrine as laid down in the Maxwell Land Grant case is again cited approvingly in the case of *United States vs. San Jacinto Tin Co.*, 125 U. S. 273, 300; 31 L. Ed. 747, 756, in which the Court says:

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every regularity or even impropriety in the process by which the patent is procured."

United States vs. Marshall Mining Co., 129 U. S. 579, 589; 32 L. Ed. 734, 738.

To the same effect see:

United States vs. Iron-Silver Mining Co., 128 U. S. 673, 678; 32 L. Ed. 571, 573.

United States vs. Des Moines Nav. & R. Co.,
142 U. S. 510, 541; 35 L. Ed. 1099, 1108.

In *Files vs. Brown*, 124 Fed. 133, at 139, Judge Sanborn says:

“If there is one proposition in the law regarding the rescission of contracts and the cancellation of muniments of title that is established beyond doubt or cavil, it is that the complainant must establish the essential facts of his cause of action with clearness and certainty, to entitle him to any relief.” (Citing authorities.)

“A written instrument cannot be avoided for fraud or mistake unless the evidence of the fraud or mistake is clear, unequivocal and convincing.”

Chicago, St. P., M. & O. Ry. Co. v. Belliwith,
83 Fed. 437, 440.

Howland vs. Blake, 97 U. S. 624, 24 L. Ed. 1027, 1028.

“In a suit by the United States to cancel a patent to public land on the ground of fraud, the burden of proof to establish the fraud is on the Government, and the evidence, whether direct and positive, or circumstantial, must be clear, unequivocal and convincing.”

United States vs. Mills, 169 Fed. 686 (Syllabus 1).

“The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual.”

United States vs. Stinson, 197 U. S. 200,
49 L. Ed. 724.

The rule as announced in the case of *United States v. Detroit Timber and Lumber Co.*, 124 Fed. 393, 402, AFFIRMED in 131 Fed. 668, REAFFIRMED in 200 U. S. 321, 50 L. Ed. 499:

“If the proposition as thus laid down in the cases cited is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is made to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States, under its official seal.”

United States vs. Maxwell Land Grant Co.
(Supra.)

The same doctrine has been approved in the cases of:

United States vs. Clark, 200 U. S. 601, 50
L. Ed. 613.

Chicago & Northwestern R. Co. vs. Wilson,
116 Fed. 913.

Files vs. Brown, 124 Fed. 133-139.

Fowler vs. Fowler, 135 Fed. 405, 410.

Maslin vs. Noble, 157 Fed. 506, 508.

And also in:

United States vs. Barber Lumber Company,
172 Fed. 948.

AFFIRMED: 194 Fed. 24.

III.

The bill does not allege specifically and in detail in what the fraud consists, and the evidence is far from being of that class commanding respect. It is in no sense clear and unequivocal. The weight of the evidence is not even upon the part of the Government, much less being evenly balanced or in favor of the Government. The chief witness for the Government is Clarence W. Robnett. The evidence of this witness is not the class of evidence which the courts hold must command respect. The evidence, as a whole, is insufficient to establish fraud in connection with any entry, much less in connection with all of the entries.

United States vs. Barber Lumber Co.
(Supra).

United States vs. Biggs, 211 U. S. 507; 53
L. Ed. 305.

Williamson vs. United States, 207 U. S. 425;
52 L. Ed. 278.

United States vs. Budd, 144 U. S. 154-173;
36 L. Ed. 384.

IV.

Even if the evidence was of that class which commands respect, and was sufficient to prove fraud on the part of the entrymen, there is no evidence to

prove that any of the defendants were parties to the fraud; the land has all been transferred to innocent purchasers, for value, in due course of business and in good faith, which prevents a decree for the cancellation of the patents.

United States vs. Clark (Supra).

“The rights of a bona fide purchaser from one who has entered timber lands under the Act of Congress of June 3, 1878, which provides that, for a false statement by the entryman, any grant which he may have made shall be void, except in the hands of a bona fide purchaser, are not affected by a subsequent cancellation of the entry for false representations, although at the time of his purchase no patent for the land had been issued.”

Lewis vs. Shaw, 70 Fed. 289.

“Where land has been regularly entered under Act June 3, 1878, providing for the sale of lands chiefly valuable for timber and stone, it is not subject to forfeiture in the hands of a bona fide purchaser.”

Hawley vs. Diller, 75 Fed. 946.

United States vs. Detroit Lumber Company (Supra).

In *United States vs. California & Oregon Land Co.*, 148 U. S. 31-41; 47 Law Ed., 354, at 359 (L. Ed.)

Mr. Justice Brewer says:

“The right, therefore, of this defendant, the California & Oregon Land Company, to avail itself of a plea cannot be doubted; and the plea

which it made in this case, *that of a bona fide purchaser is one favored in the law.* * * *

In *Stark vs. Starr*, 73 U. S. 402; 18 Law Ed. 925, Mr. Justice Field says (at 929 L. Ed.) :

“The right to a patent once vested is treated by the Government, when dealing with public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants.”

In *United States vs. Stinson*, 197 U. S. 200; 49 L. Ed. 724, at page 725 (Law Ed.), Mr. Justice Brewer says:

“Third. It is a good defense to an action to set aside a patent that the title has passed to a bona fide purchaser, for value, without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the Government, but will also protect the rights and interests of innocent parties.” (Citing cases, and citing approvingly from *Colorado Coal & Iron Co. vs. U. S.*, *Supra.*)

We call the Court's attention to a decision of the Superior Court of Cook County, Illinois, found in Vol. 42 of the National Corporation Reporter of May 25, 1911, in the case of *Pasquale Schiarone vs. Francesco Schiarone, et al.* This decision was rendered upon exception to the Master's report, and the exceptions were sustained as being against the weight of

the evidence and contrary to law. Section 2 and 3 of the Syllabus are as follows:

(2) "It is the rule in this State that in civil cases when it is necessary to establish facts which show a crime, the same degree of proof is required to sustain the action or defense, as would be required to procure a conviction under an indictment for the same offense. That is, the presumption of innocence arises, and the crime charged must be proven by evidence which removes every reasonable doubt of guilt."

(3) "When the Complainant has not established his case by the measure of proof required, and where the findings of the Master are not even supported by a preponderance of the evidence, the exceptions to the Master's report must be sustained."

In the body of the decision, the Court holds:

"It is the rule in this state that in a civil case, when it is necessary to establish facts which show a crime, the same degree of proof is required to sustain the action or defense as would be required to procure a conviction under an indictment for the same offense. That is, proof beyond a reasonable doubt. *Harbinson vs. Shook*, 41 Ill. 141; *McConnell vs. Delaware M. S. Ins. Co.*, 18 Ill. 228; *Grimes vs. Hilliary*, 150 Ill. 141."

"In *Sprague vs. Dodge*, 48 Ill. 142, it was held that in civil actions where either party relies upon establishing a criminal offense against the other, the presumption of innocence should only be yielded upon satisfacory evidence of guilt. In the case of *Oliver et al. vs. Oliver*, 110 Ill. 119, the bill sought to set aside a deed on the ground of forgery, and it was held that the charge of

forgery was one which the complainant was bound to prove affirmatively by clear and convincing proof before relief could be granted. In *People vs. Sullivan*, 218 Ill. 437, the Court says: "The information herein charges the respondent with the commission of a crime. The rule in Illinois, except as modified by statute in actions of slander and libel, is that when a criminal offense is charged in the pleadings, and must be established either to sustain the cause of action, or maintain the defense, the presumption of innocence arises, and the crime charged must be proven by evidence which removes every reasonable doubt of guilt.'"

While this decision is rendered by a lower court, yet it is so well supported by decisions from the Appellate Courts, and is so sound in its reasoning, that we believe the Court will be satisfied to follow the rule therein announced, and we respectfully submit that the case is very similar to the case at bar. Under the rule laid down in the United States Courts, and under the authorities heretofore cited the proof required to warrant the cancellation of a patent must be clear and satisfactory; must be stronger than beyond a reasonable doubt.

There is no direct evidence of a conspiracy. The Government relies solely upon circumstantial evidence to prove the conspiracy, and the case was submitted to the court entirely upon the presumption and inferences drawn from certain statements and

facts alleged to have been established by the Government, but applying the rule laid down in the case of *United States Fidelity Company vs. Des Moines National Bank*, 145 Fed. 273, the Court says :

“A theory cannot be said to be established by circumstantial evidence even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. If the facts are consistent with either of two opposing theories, they prove neither.”

Was there then substantial evidence to show a conspiracy or fraud on the part of the defendants? The jury in one case involving the same matters, and the same evidence, found there was not sufficient evidence to warrant a conviction in a criminal case. The court to whom the case was again submitted and tried, and who considered the evidence carefully, as the same applied to each and all of the different entries, found that the evidence was insufficient to warrant a cancellation of the patents. This Court is called upon to review the same evidence, and, although it has never had the opportunity of meeting the witnesses, hearing them testify, as did the court below, and has never had the opportunity of understanding the circumstances surrounding the evidence of each and every witness, is now asked to overturn

the verdict of the jury, the decision of Judge Dietrich, and reverse the case. It may be argued that Judge Dietrich in the case at bar did not hear the witnesses testify, and did not have an opportunity to observe their demeanor upon the stand. To this we reply that Judge Dietrich did have an opportunity of hearing the witness testify, observing their demeanor upon the stand, and of knowing the facts and circumstances surrounding their giving of their evidence in the criminal case (*United States vs. Kettenbach, Kester and Dwyer*), which involved the same transactions, the same evidence, and the same witnesses. We call the Court's attention to the verdict of the jury, appearing at page 4180 of the transcript. This verdict, in connection with the decision and judgment of the lower court, is entitled to due consideration, and should have great weight with this Court in its efforts to reach a fair, just and equitable conclusion.

Respectfully submitted,

GEO. W. TANNAHILL,

Solicitor for the Respondents, William F. Kettenbach, George H. Kester, William Dwyer, Elizabeth White, Edna P. Kester, Martha E. Hallett and Kittie E. Dwyer.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,

vs.

Appellant,

No. 2209

William F. Kettenbach, George H. Kester,
William Dwyer, and

Frank W. Kettenbach, Appellees.

THE UNITED STATES OF AMERICA,

vs.

Appellant,

No. 2210

William F. Kettenbach, George H. Kester,
Clarence W. Robnett, William Dwyer, The
Idaho Trust Company, a Corporation, The
Lewiston National Bank, a Corporation,
The Clearwater Timber Company, a Cor-
poration, Elizabeth W. Thatcher, Curtis
Thatcher, Elizabeth White, Edna P. Kes-
ter, Elizabeth Kettenbach, Martha E. Hal-
lett, and Kitty E. Dwyer, Appellees.

THE UNITED STATES OF AMERICA,

vs.

Appellant,

No. 2211

William F. Kettenbach, George H. Kester,
and William Dwyer,

Appellees.

SUPPLEMENTAL BRIEF OF APPELLEES

PEYTON GORDON,

Attorney for Appellants.

GEORGE W. TANNAHILL,

Attorney for Appellees,

For whom he appears.

Appeals from the District Court of the United States
for the District of Idaho, Central Division.

FILED

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THE UNITED STATES OF AMERICA,
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William F. Kettenbach, George H. Kester,
and William Dwyer, Appellees.

SUPPLEMENTAL BRIEF OF APPELLEES

The appellant failed to serve its brief within the time provided by the rules of the Court, the same not having been received by the attorneys for the appellees until February 24th, 1913. In order to reach San Francisco in time to prepare for the argument it was necessary for the attorneys for the appellees to leave their home on February 26, 1913, which they did. The appellees have been afforded no time to reply to the brief of the appellant prior to the argument. A reply was made to certain portions of appellant's brief, page proof of which was received by one of the attorneys for the appellees a few days prior to the time the briefs of the appellees went to the press. Some matters not referred to or urged in the lower court, and which appear from that portion of appellant's brief not received by the appellees prior to the printing of the answer brief, should be answered, and it will be our purpose to deal with those matters in this supplemental brief.

CLAIM THAT ENTRYMEN WERE IN INDIG-
ENT CIRCUMSTANCES AT THE TIME THEY
ACQUIRED TITLE TO THE LAND IN QUES-
TION.

A reference to appellant's brief shows that this claim is only indirectly made, and a very slight effort to show that the entrymen were in indigent circumstances appears. However, for the reason that some reference to the same was made in the evidence and a slight reference to this contention appears in the brief of appellant, we have taken the time and trouble to make an examination of the record, and beg leave to call the court's attention to the same, in relation to each and every entryman.

It will be observed that this contention was not seriously urged in the lower court or in the trial, and it was not referred to by the appellees in the lower court. Neither was it extensively developed in the evidence, for the reason that the appellees did not consider it important under the circumstances.

Then, when there was no evidence bearing upon the financial condition of the entryman, it will be presumed that the entryman was not in indigent circumstances. Appellant carries the burden of proof and where there is no evidence the finding is against appellant.

VAN V. ROBERTSON

We first call the Court's attention to the evidence of Van V. Robertson. This seemed to be the only entry counsel saw fit to attack in his oral argument, and stated that Robertson testified that he had \$2850 in the Lewiston National Bank, and the records of the bank show that he had no deposit there whatever. We call the Court's attention to page 778 of the record, the evidence of Van V. Robertson, for the purpose of showing that counsel's statement is not only outside the record but that his statement is unfounded in fact. The witness Van V. Robertson, on page 778, testifies:

Q. Did you have at that time the money with which to purchase a timber claim?

A. I did when I filed on it.

Q. You did?

A. Yes, sir.

Q. Did you have it in the bank?

A. Yes, sir.

Q. How much?

A. Oh, I don't remember how much I had. I know I had when I came there.

Q. How much did you have when you came there?

A. I transferred \$2850 from the Camas Prairie Bank to the Lewiston National Bank.

Q. And when was that?

A. I came here sometime in December—late in December.

Q. That was the December before you entered in February?

A. When I moved I transferred this in January. I wouldn't be positive exactly about the dates.

Q. And how did you transfer it—in what form?

A. Why, to do my banking business here instead of doing it in Grangeville. I moved here.

Q. Do you mean you drew a check and transferred it here?

A. Yes, sir.

Q. You didn't take a certificate of deposit?

A. I think I just drew a check.

Q. And opened up an account with the Lewiston National Bank?

A. Yes, sir.

Q. And that was the latter part of 1902 or the first of 1903?

A. Well, yes, it might have been in January, because I came very late in the year. It was the latter part of December that I came here, and it might have been the first of the year that I transferred it; I am not positive.

If Mr. Robertson's statement was not correct it would have been very easy to have made an examination of the books of the Bank of Camas Prairie for the purpose of ascertaining whether or not the witness did have this amount of money. As to when it was transferred is immaterial. It was transferred at some time, and the witness possessed the money at the time he filed his entry, and whether the money was on deposit at the Lewiston National Bank, at the time he filed, or shortly after he filed, is of but little importance.

On page 786 the witness testifies:

Q. Now, did I understand you to say that you deposited in the Lewiston National Bank about \$2,800.00, about January, nineteen hundred and

.....

A. Why, I think it was somewhere along there.

Q. Are you sure it was the Lewiston National Bank?

A. Why, I don't see how I could be mistaken in the bank I was doing business with.

Q. Well, couldn't you make a mistake and not have deposited \$2,800.00, or anything like that amount, in the Lewiston National Bank?

A. Why, let's see: I had that much in the Bank of Camas Prairie when I came here, and in making a deal for the cigar store it might be possible that I gave a check on the Bank of Camas Prairie and transferred the rest of it. Now, it might be possible; but I had that much money in the Bank of Camas Prairie when I came to Lewiston the last of December, and I bought into the cigar store that spring, early in the spring, I don't remember the time exactly, or early in the winter, I don't remember the date, but anyway I had this money, and if I didn't check it—make one check there before, why I transferred the entire amount; but it is possible that I made another check. The records would show. I have never given it a thought, particularly.

This evidence is important only for the purpose of showing that the entryman was a business man and not in indigent circumstances, and the record fully sustains this contention. In any event there is no evidence to show he had no means.

GUY L. WILSON

The evidence of Guy L. Wilson appears at page 378 of the record, wherein the witness testifies that he asked the defendant Dwyer to locate him upon a timber claim, and to borrow the money for him. The appellant did not inquire as to the witness' financial condition, and the appellees did not feel called upon to inquire into the same.

FRED W. SHAEFFER

The evidence of Fred W. Shaeffer appears at page 448 of the record, but the appellant did not inquire as to his financial condition or the property he possessed at the time he made his entry.

**WILLIAM HAEVERNICK and
ALMA HAEVERNICK**

The evidence of these witnesses appears at page 470, wherein it appears that William Havernick and one Holmberg were the owners of a stock of merchandise, which was incorporated, and which was valued at \$7,500.

WILLIAM J. WHITE and MAMIE P. WHITE

The evidence of this entryman and entrywoman appears at page 490, of the record, wherein it also appears that they have property, although the appellant did not inquire specifically as to what their property consisted of. William J. White and Mamie P. White are husband and wife, and no contention is made that they are not in good financial circumstances.

SOREN HANSEN

The evidence of Soren Hansen appears at page 512 of the record, wherein it appears that he is a farmer by occupation, has a family, and also has property. (Page 514 of the record). The appellant did not inquire concerning his property or of what the same consists.

WILLIAM McMILLAN

The evidence of William McMillan appears at page 532 of the record, wherein it appears that he is a farmer, owns his own land, and that the same is clear of incumbrances. The appellant did not inquire further concerning his holdings.

CHARLES CAREY

The evidence of Charles Carey appears at page 551 of the record, but he was not asked specifically concerning his property or of what it consists, and his financial condition was not inquired into by the appellant.

CHARLES MYERS

The evidence of Charles Myers appears at page 603 of the record. It appears that he is a farmer, is the owner of a saw mill, and employs from 12 to 15 men in his mill.

JANIE MYERS

Janie Myers is the wife of Charles Myers, and the same condition appears in relation to the financial condition of this entrywoman. Her evidence appears at page 620 of the record.

JOEL H. BENTON

The evidence of Joel H. Benton appears at page 636 of the record, wherein it appears that he was selling dry goods at the time he made his entry. The

appellant did not inquire into his financial condition or of what his property consists.

FRED W. NEWMANN.

The evidence of Fred W. Newman appears at page 671 of the record, wherein it appears that he was running a warehouse, and received a salary of \$75.00 per month; that he was running a warehouse for Frank W. Kettenbach; that he owned the house in which he lived, but paid rent upon the land. The appellant did not inquire as to his financial condition nor as to his property interests.

DANIEL W. GREENBURG

The evidence of Daniel W. Greenburg appears at page 700, wherein it appears that he was a newspaper man; that he borrowed the money for the purchase of the land; that he had a part of the money, and knew that he could get the balance at almost any place. (Page 703 of the record).

CHARLES DENT

The evidence of Charles Dent appears at page 716 of the record, wherein it appears that the wit-

ness has a family; that he rafts some; that he has a little stock and ranch of 160 acres (Page 717 of the record).

EDNA P. KESTER

The evidence of Edna P. Kester appears at page 736 of the record, wherein it appears that she is the wife of George H. Kester; that her husband gave her the money for the purchase of the land; that she still retains the title to the same.

ELIZABETH WHITE

The evidence of Elizabeth White appears at page 743 of the record. The appellant did not inquire concerning her property interests but it appears from her testimony that she is an extensive property owner.

FRANK J. BONNEY

The evidence of Frank J. Bonney appears at page 796 of the record, wherein it appears that he is a carpenter and machinist; that he owned a homestead free of incumbrances, and had part of the

money to pay for the land. The appellant did not inquire further concerning his property interests.

CLINTON E. PERKINS

The evidence of Clinton E. Perkins appears at page 716 of the record, wherein it appears that he is a married man and has a family; is a farmer by occupation; that his farm is worth \$2,500, and was not mortgaged at the time he filed upon the land in question, but he has mortgaged the same since that time for \$750. That he sold timber and cattle for the money to make final proof, and had more than \$400 in cash.

FRANCES E. JUSTICE

The evidence of this witness appears at page 843 of the record, wherein it appears that she owns her own home, but that the same was mortgaged, and that she could not mortgage it again for the money to pay the purchase price. That she tried to borrow the money from a Mr. Crocker, and finally asked Mr. Dwyer as a favor if he would borrow it for her. The appellant did not inquire concerning her other property interests.

GERRY VANARTSDALEN

The evidence of Gerry VanArtsdalen appears at page 836 of the record, wherein it appears that he is a freighter by occupation; that he owned a tract of land at the time he made his entry having purchased his father's homestead (page 866 of the record). That he paid the purchase price of his land; borrowed none of the money, and the appellant did not inquire further concerning his property interests.

BERTSALL H. FERRIS

The evidence of this witness appears at page 873 of the record, wherein it appears that he is an electrician, and draws a salary of from \$65 to \$70 per month. That he paid his own expenses to the land. (Page 876 of the record). The appellant did not inquire concerning his property holdings.

HIRAM F. LEWIS

The evidence of Hiram F. Lewis appears at page 901 of the record, wherein he testifies that he made the arrangements for his own claim and that of his brother, Edward M. Lewis; that he is an engineer by occupation, and was working for \$70 per month. That he had money of his own at the time he acquir-

ed the land, either \$300 or \$400. That he used \$200 of his own money to purchase the land. The appellant did not inquire concerning his property interests.

JOHN E. NELSON

The evidence of John E. Nelson appears at page 1038 of the record, wherein it appears that he is a married man, and is a salesman for the Lewiston Mercantile Company. That he paid his own expenses, for filing fees, and the money to make final proof was handed to him by a Mr. Miller. The witness testifies at page 1051:

“I considered my worldly goods worth a great deal more than \$400.”

The appellant did not inquire specifically concerning his property interests.

CHARLES W. TAYLOR

The evidence of Charles W. Taylor appears at page 1058 of the record. He borrowed money of Jackson O'Keefe to pay the purchase price. The appellant did not inquire concerning his property interests or his financial condition.

EDGAR J. TAYLOR

The same condition appears in relation to the evidence of Edgar J. Taylor, whose evidence appears at page 1110 of the record.

DAVID S. BINGHAM

The evidence of David S. Bingham appears at page 1139 of the record, wherein it appears that the witness was working for O'Keefe and George H. Kester on an irrigation project at Cloverland at the time he filed upon his land, and that his salary was \$75 per month. That his wife was running a hotel at Cloverland at the time. That he had quite a bit of money coming to him, and wanted to buy a ten-acre irrigated tract. (Page 1154 of the record). The appellant did not inquire specifically concerning his property holdings or his financial condition.

EDGAR H. DAMMARELL

The evidence of Edgar H. Dammarell appears at page 1171 of the record, wherein he testifies that he was living on a homestead at the time he acquired title to the land; borrowed the money of Jackson O'Keefe to pay the purchase price (page 1175 of the

record). That he had theretofore purchased a thirty-acre irrigated tract of land from Jackson O'Keefe, and let his father have twenty acres of the same. (Page 1182 of the record).

JOSEPH H. PRENTICE

The evidence of this witness appears at page 1125 of the record. The witness testifies that he borrowed the money of Jackson O'Keefe to pay for the land. The appellant did not inquire concerning his property interests or his financial condition.

JOHN H. LONG

The evidence of John H. Long appears at page 1252 of the record. The witness states that he was working around and attending to investments at the time. The appellant did not inquire concerning his property interests or his financial condition.

FRANCIS M. LONG

The evidence of Francis M. Long appears at page 1278 of the record. The witness testifies he had money of his own he could not get hold of at the time he made his final proof; that he intended to pay

the claim out and hold it. (Page 1281 of the record). The appellant did not inquire as to his financial condition or property interests.

BENJAMIN F. LONG

The evidence of this witness appears at page 1297 of the record. The appellant did not inquire concerning his property interests or his financial condition.

GEORGE RAY ROBINSON

The evidence of George Ray Robinson appears at page 1317 of the record. The appellant did not inquire concerning his financial condition or property holdings.

ELLSWORTH M. HARRINGTON

The evidence of this witness appears at page 1354 of the record. The witness testifies he is an engineer by occupation; has a family, works for a salary of \$3.00 per day that he received money from Robnett to make his final proof. Page 1357 of the record. The appellant did not inquire concerning his property interests or financial condition.

MISS ELIZABETH KETTENBACH

The evidence of this witness appears at page 1566 of the record. She inherited money from her mother's estate to pay for the land, and borrowed money from William F. Kettenbach temporarily, as a note she had expected would be paid at the time she would make her final proof was not paid. (Page 1569 of the record).

MARTHA E. HALLETT

The evidence of Martha E. Hallett appears at page 1592 of the record. Her husband left her an estate of probably \$100,000, and at pages 1901-2 the witness testifies that shortly before she acquired title to the land in question the defendant George H. Kester had collected a note due her in Portland amounting to about \$16,000. (Page 1608 of the record.)

BENJAMIN F. BASHOR

The evidence of Benjamin F. Bashor appears at page 2090 of the record. That he was County Assessor immediately prior to acquiring title to the land. The appellant did not inquire concerning his property interests or financial condition.

JAMES T. JOLLY

The evidence of this witness appears at page 1156 of the record. That he was a teamster and farmer. He has a family; owns his own home and had 100 acres under cultivation. The appellant did not inquire concerning his property interests or financial condition.

EFFIE A. JOLLY

Effie A. Jolly is the wife of James T. Jolly.

CHARLES E. LONEY

The evidence of Charles E. Loney appears at page 2745 of the record. He testifies that he had about \$150 of his own money which he used in making his final proof; that he is a farmer by occupation. The appellant did not inquire as to his property holdings or financial condition. He testified that he had recently sold a boiler and engine and this \$150 was derived from that source. (Page 2755 of the record).

CHARLES E. SMITH

The appellant did not inquire concerning the financial condition of this witness. His evidence appears at page 2896 of the record.

LON E. BISHOP

The appellant did not inquire concerning the financial condition of Lon E. Bishop.

We submit that the evidence of those witnesses, during whose testimony their financial condition was touched upon, wholly fails to support counsel's contention that the witnesses were in indigent circumstances; and we submit, further, that where there is no evidence at all on the question of a witness's financial condition, no presumption arises, or should be indulged, that the witness was in indigent circumstances. On the contrary, where no evidence appears, the legal presumption is that the witness was not in indigent circumstances, but was solvent, and in support of this contention we invite the Court's attention to the following authorities:

In Vol. 7, *Encyc. of Evidence*, Title "Insolvency," page 482, it is said:

"The fact of solvency is always presumed until insolvency is established, and he who asserts the fact of insolvency has the burden of proving it." (Citing authorities; and in 1910 Supplement of same, many additional authorities are cited).

"Every man is presumed solvent until shown to be insolvent."

Warren vs. Robison

70 Pac. 989,

25 Utah 205.

“In the absence of an allegation to the contrary, it will be presumed a firm was solvent when it sold its property.”

Jenson vs. Montgomery,

80 Pac. 504,

29 Utah 89.

CLAIM THAT THE ENTRYMEN WERE SOLICITED BY THE DEFENDANTS OR THEIR AGENTS, EMERY, O'KEEFE AND STEFFEY TO FILE UPON TIMBER LAND.

Upon examination of the appellant's brief we find various discussions relative to the entrymen being solicited by the defendants or their agents to file upon timber lands, and on page 253 of appellant's brief counsel uses the following language:

“The fact that every entry was made at the solicitation of one of said defendants or of their agents or co-conspirators, Emery, O'Keefe and Steffey, * * *

We have made an examination of the record for the purpose of ascertaining the truthfulness of this statement, and find that the language used by counsel is wholly unsupported by the record. It seems to us that it could be little short of a deliberate at-

tempt to mislead the Court and unjustly impose upon the defendants. The bills in equity, as consolidated, are three in number, to-wit: No. 388, involving 16 entries, No. 406, involving 38 entries, and No. 407, involving 8 entries, aggregating 62 entries. Appellant admits, on page 290 of his brief, the validity of the following entries: John W. Killinger, William E. Helkenberg, Fred E. Justice, Charles W. Harrington and Gerry VanArtsdalen, and upon page 327 counsel admits the validity of the entry of Ivan R. Cornell, Rowland A. Lambdin and Fred W. Shaeffer, which were conveyed to the Potlatch Lumber Company, and the validity of these entries is, in effect, admitted for the reason that there is little in the record to show that the Potlatch Lumber Company is not an innocent purchaser, thus leaving for consideration here 54 entries.

A diligent search of the record fails to show that a single entryman was solicited by the defendants William Dwyer or William F. Kettenbach. There is no contention that entrymen were solicited by George H. Kester, save and except Ivan R. Cornell and Fred W. Shaeffer. William McMillan testifies, at page 535 of the record, that Kester discussed the question of taking up a timber claim with him, but the evidence falls far short of showing solicitation.

ELLSWORTH M. HARRINGTON

(Page 1349 of the record)

The witness testifies that he first spoke to Clarence W. Robnett regarding his being located upon a timber claim.

The following entrymen were solicited by the defendant Clarence W. Robnett:

Robert O. Waldman, page 3725 of the record;

Soren Hansen, page 517 of the record;

Drury M. Gammon, page 2102 of the record;

Carrie D. Maris, page 2085 of the record;

John H. Little, page 1609 of the record;

Benjamin F. Bashor, page 2092 of the record;

Bertsall H. Ferris, page 873 of the record.

George Ray Robinson testifies that Ferris first spoke to him concerning the taking up of a timber claim. Then he went to see Robnett. (Page 1319 of the record).

F. D. Morrison says that Dwyer spoke to him about going into the timber business with him, but he did not take a claim. (Page 1221 of the record). This is denied by Dwyer.

Sherburn says that Dwyer talked with him about taking a timber claim, but it was a joke.

Wynn Peffley says that he went to Kester, and first talked with Kester about locating him upon a timber claim. (Page 1216 of the record).

Ivan R. Cornell says that Kester first spoke to him about taking up a timber claim. (Page 2860 of the record) Kester admits that he talked with Cornell about taking up a timber claim, but it was in an effort to help Cornell, and after Cornell had repeatedly borrowed small sums of money from Kester, and after Cornell had asked Kester to obtain employment for him, and on account of Cornell and Kester being old schoolmates at Bishop Scott Academy, he desired to render him assistance if he could; that he had no agreement for the purchase of his claim.

Fred W. Shaeffer testifies at page 450 of the record that Kester first spoke to him about taking up a timber claim, and Kester explains that Shaeffer first spoke to him (Kester) about taking up a timber claim, and that Kester loaned money to him with which to pay the purchase price.

This is the extent of the entrymen claimed to have been solicited by Kester, save and except the appearance in the record, over the defendants' objection, of some reference to the witness Lambdin ac-

quiring title to timber land, and that Hutchins first spoke to the witness Lambdin concerning it.

The witness John P. Roos, who did not take a timber claim, says that Kester first spoke to him, and wanted to buy his right, (Page 1209 of the record). This is denied by Kester.

Ellsworth M. Harrington, (page 1349 of the record), testifies that he first spoke to Clarence W. Robnett regarding his being located upon a timber claim.

Wren Pierce did not testify, and there appears no evidence either way.

Joseph B. Clute did not testify, and there appears no evidence either way.

John H. Long, whose evidence appears at page 1254 of the record, testifies that he, with his father and brother, went to see Robnett concerning their being located upon a timber claim. To the same effect is the evidence of Frances M. Long and Benjamin F. Long.

Edna P. Kester testifies, (at page 738 of the record), that her husband, George H. Kester, the defendant, did not want her to take a timber claim, but she insisted and finally persuaded him to let her exercise her right.

Elizabeth Kettenbach testifies, (at page 1558 of the record), that she herself first suggested going to the timber and taking a timber claim.

To the same effect is the evidence of William J. White, appearing at page 493 of the record, and of Mamie P. White, to the same effect, appearing at page 494 of the record.

Martha E. Hallett testifies that she first broached the subject herself. (Page 1594 of the record).

Daniel Greenburg testifies that he first spoke to Dwyer about being located on a timber claim. (Page 701 of the record).

Hattie Rowland did not appear or testify, and there appears to be no evidence either way.

William Haevernick testifies that he was located by a Mr. Mortimer, and had no conversation with either of the defendants or anyone connected with them in any manner concerning the taking up of a timber claim. (Page 473 of the record).

Alma Haevernick testifies to the same state of facts, and that her husband attended to the business for her.

W. B. Benton was a locator, and it was unnecessary for him to apply to anyone, or have anyone consult him about taking up a timber claim, and there is no evidence that he was consulted by either

of the defendants or by anyone connected with them.

Joel H. Benton testifies that he first spoke to W. A. Smith concerning his locating him upon a timber claim. (Page 637 of the record).

Van V. Robertson testifies that he first spoke to Ed Knight concerning his being located upon a timber claim. (Page 776 of the record).

John E. Nelson says that he first spoke to H. R. Miller, and had no arrangements with Robnett or either of the defendants. (Page 1041 of the record.)

Frederick W. Newman states that he applied to Fred Emery to be located upon a timber claim. (Page 674 of the record).

Lon E. Bishop testified, but there is no evidence as to who spoke to him concerning the taking up of a timber claim, and it does not appear that either of the defendants or anyone else solicited him to take up a timber claim.

Charles Smith testifies that he and Ben Clute first spoke to Fred Emery about taking up a timber claim; that they talked between themselves and concluded if they could take a timber claim, and sell it, it would enable them to hold their homesteads. (Page 2996 of the record).

Charles Dent testifies that Emery, in the course of a conversation, asked him if he had ever taken a

timber claim, but it does not appear that Emery solicited him to take up a timber claim. (Page 716 of the record).

The witness Hyde did not appear and testify, and there is no evidence either way as to his being solicited.

Guy L. Wilson testifies that he first went to Dwyer's home to see about being located on a timber claim. (Page 371 of the record).

Frances A. Justice testifies that she first went to see Mr. Dwyer for the purpose of being located upon a timber claim. (Page 847 of the record).

Hiram F. Lewis testifies that he first went and talked with John E. Nickerson about being located on a timber claim; went to the timber, didn't like the claim, and then called on William Dwyer and asked to be located upon a timber claim. (Page 903 of the record).

Edward M. Lewis testifies that he first talked with his brother, Hiram F. Lewis about being located on a timber claim, and Hiram F. Lewis testifies that he asked Dwyer to locate the witness and his brother, Edward M. Lewis, upon a timber claim.

George Morrison did not appear and testify, and there is no evidence either way concerning his being located upon a timber claim.

STEFFEY GROUP

Janie Myers testifies (at page 621 of the record) that she applied to Steffey, and asked Steffey to locate her upon a timber claim.

Clinton E. Perkins testifies that he applied to Steffey, and asked Steffey to find him a timber claim. (Page 820 of the record).

Mary E. Loney testifies that she sent Steffey word she wanted a timber claim. (Page 2721 of the record).

Charles E. Loney testified that he applied to Steffey to be located on a timber claim (page 2747 of the record).

Frank J. Bonney testifies that he first spoke to Steffey about being located on a timber claim. (Page 793 of the record).

James T. Jolly testifies that he first applied to Steffey, and asked to be located upon a timber claim. (Page 2658 of the record).

Effie A. Jolly testifies that she first applied to Steffey and asked to be located upon a timber claim.

Charles S. Myers testifies that he first applied to Steffey and asked to be located upon a timber claim.

THE O'KEEFE GROUP

David S. Bingham testified that Jackson O'Keefe first spoke to him about being located on a timber claim. (Page 1141 of the record).

Charles W. Taylor testifies (at page 1063 of the record) that Jackson O'Keefe first spoke to the witness about taking up a timber claim.

Edward J. Taylor testifies (at page 1111 of the record) that his brother, Charles W. Taylor, first spoke to the witness about taking up a timber claim.

Edgar H. Dammarell testifies (at page 1173 of the record) that Charles W. Taylor first spoke to the witness about taking up a timber claim.

Joseph H. Prentice testifies (at page 1226 of the record) that Charles W. Taylor first spoke to the witness about taking up a timber claim.

Jackson O'Keefe was deceased at the time of the hearing and did not testify, and there is no evidence either way concerning his taking up a timber claim, but George H. Kester testifies that Jackson O'Keefe first spoke to him concerning his being located upon a timber claim.

We have endeavored to point out the pages wherein the witnesses have testified, and call the Court's attention to their evidence as to what induced them to take up a timber claim, and in so doing we have

disregarded the evidence of the witness Clarence W. Robnett. We feel justified in doing this for the reason that in these cases Clarence W. Robnett is in conflict with the entrymen, and the lower court found that the conditions under which he testified to be such that he was not justified in assuming that his evidence was true.

The defendants are not bound by the knowledge of Robnett concerning the validity of any of the entries with which he had to do, for the reason that he was seeking to sell the land, and would not disclose the invalidity of the entries, or the irregularities in the acquisition of title, to those to whom he desired to sell.

We call the Court's attention to the case of *McL-ton vs. Pensacola Bank & Trust Company*, 190 Fed. 126, in which the court says:

"Where the cashier of a bank pledged notes with such bank as collateral security for his own indebtedness, the bank is not chargeable with his knowledge of any infirmity in such notes."

"Knowledge or notice acquired by officer or agent of bank in private business, or outside scope of duties, as affecting its liability: See Note, *McCalmont vs. Lanning*, 84 C. C. A., 139."

Real Estate Trust Company of Philadelphia vs. Washington A. & M. T. V. Railway Company, (Circuit Court of Appeals, 3rd Circuit).

(Syllabus) "2. *Knowledge of Fraud.* A bank has no constructive notice of acts by an officer which he would not naturally disclose to it."

"3. Knowledge of fraud of the Trust Company's President, in depositing bonds of another as collateral to fictitious loans for his own benefit, is not imputable to the Company."

Perry Naval Store Company vs. Caswell
57 So. 660.

ARGUMENT ON QUESTION OF CROSS EXAMINATION OF APPELLANT'S WITNESSES

On page 255 of appellant's brief appears a reference to the cross-examination of appellant's witnesses, and quote therefrom the following:

"The cross examination of these Government witnesses was most remarkably protracted, constituting probably one-half the testimony of the witnesses, and being certainly of a volume enormously disproportionate to the examination in chief."

For the purpose of testing the truthfulness of this statement we have made a careful examination of the evidence of the various witnesses, and beg leave to call the Court's attention to the same as follows:

Guy L. Wilson—				Pgs of record
Direct examination,	50	pages		
Cross	"	9	"	374-433
Ella Wilson				
Direct examination,	11	pages		
Re-direct	"	1	"	
Cross	"	2	"	434-447

Fred W. Shaeffer,				
Direct examination,	16	pages		
Cross	"	5	"	
Re-direct	"	1	"	448-469
William Haevernick,				
Direct examination,	14	pages		
Cross	"	1	"	470-485
Alma Haevernick,				
Direct examination,	3	pages		
Cross	"	1	"	
Re-direct	"	1	"	485-490
William J. White,				
Direct examination,	20	pages		
Cross	"	1	"	
Re-direct	"	2	"	490-512
William McMillan,				
Direct examination,	17	pages		
Cross	"	2	"	532-551
Charles Carey,				
Direct examination,	24	pages		
Cross	"	6	"	
Re-direct	"	7	"	551-588
Mamie P. White,				
Direct examination,	13	pages		
Cross	"	1	"	588-602
Charles S. Myers,				
Direct examination,	14	pages		
Cross	"	4	"	602-620
Mrs. Janie Myers,				
Direct examination,	13	pages		
Cross	"	3	"	620-636
Joel H. Benton,				
Direct examination,	13	pages		
Cross	"	3	"	
Re-direct	"	2	"	636-671

Frederick W. Newmann,			
Direct examination,	23	pages	
Cross	"	1	"
Re-direct	"	3	"
			671-700
Daniel W. Greenburg,			
Direct examination,	14	pages	
Cross	"	1	"
			700-715
Charles Dent,			
Direct examination,	17	pages	
Cross	"	2	"
			716-736
Edna P. Kester,			
Direct examination,	5	pages	
Cross	"	2	"
			736-743
Elizabeth White,			
Direct examination,	28	pages	
Cross	"	2	"
			743-773
Van V. Robertson,			
Direct examination,	18	pages	
Cross	"	3	"
Re-direct	"	1½	"
			774-795
Frank J. Bonney,			
Direct examination,	17	pages	
Cross	"	2	"
Re-direct	"	1	"
			795-812
Clinton E. Perkins,			
Direct examination,	19	pages	
Cross	"	4	"
Re-direct	"	5	"
			816-843
Frances A. Clausen (Justice),			
Direct examination,	53	pages	
Cross	"	9	"
Re-direct	"	3	"
			844-862
			1411-1422

Gerry VanArtsdalen,				
	Direct examination,	10	pages	
	Cross	"	1½ "	863-873
Bertsal H. Ferris,				
	Direct examination,	23	pages	
	Cross	"	2 "	
	Re-direct	"	2 "	873-900
Hiram F. Lewis,				
	Direct examination,	67	pages	
	Cross	"	8 "	
	Re-direct	"	26 "	901-1003
Albert J. Flood,				
	Direct examination,	6	pages	
	Cross	"	12 "	
	Re-direct	"	2 "	1003-1023
Walter Williams,				
	Direct examination,	5	pages	
	Cross	"	9 "	
	Re-direct	"	1 "	1023-1038
John E. Nelson,				
	Direct examination,	17	pages	
	Cross	"	2 "	
	Re-direct	"	2 "	1038-1058
Charles W. Taylor,				
	Direct examination,	18	pages	
	Cross	"	9 "	
	Re-direct	"	17 "	1058-1110
Edgar J. Taylor,				
	Direct examination,	14	pages	
	Cross	"	4 "	
	Re-direct	"	1 "	1110-1139
David S. Bingham,				
	Direct examination,	17	pages	
	Cross	"	12 "	
	Re-direct	"	3 "	1139-1171

Edgar H. Dammarell,			
Direct examination,	26	pages	
Cross "	2	"	
Re-direct "	2	"	1171-1201
Samuel C. Hutchins,			
Direct examination,	3	pages	
Cross "	1	"	
Re-direct "	1	"	1201-1205
Wynn Peffley,			
Direct examination,	3	pages	
Cross "	2	"	1205-1209
John P. Roos,			
Direct examination,	2	pages	
Cross "	3	"	1209-1214
Andrew Sherburn,			
Direct examination,	2	pages	
Cross "	1	"	1214-1218
F. D. Morrison,			
Direct examination,	3	pages	
Cross "	3	"	1218-1224
Joseph H. Prentice,			
Direct examination,	23	pages	
Cross "	2	"	
Re-direct "	2	"	1225-125?
John H. Long,			
Direct examination,	24	pages	
Cross "	1	"	1252-1278
Francis M. Long,			
Direct examination,	17	pages	
Cross "	2	"	1278-1297
George Ray Robinson,			
Direct examination,	23	pages	
Cross "	5	"	
Re-direct "	2	"	1297-1317

Benjamin F. Long,				
	Direct examination,	17	pages	
	Cross	"	3	"
				1317-1346
Ellsworth M. Harrington,				
	Direct examination,	15	pages	
	Cross	"	4	"
	Re-direct	"	1	"
				1347-1366
Elizabeth Kettenbach,				
	Direct examination,	20	pages	
	Cross	"	11	"
	Re-direct	"	4	"
				1557-1592
Martha E. Hallett,				
	Direct examination,	15	pages	
	Cross	"	2	"
				1592-1609
John H. Little,				
	Direct examination,	14	pages	
	Cross	"	4	"
				1609-1627
E. N. Brown,				
	Direct examination,	11	pages	
	Cross	"	17	"
	Re-direct	"	8	"
				1638-1684
Mabel K. Atkinson,				
	Direct examination,	4	pages	
	Cross	"	1	"
				1684-1689
Joseph Alexander,				
	Direct examination,	11	pages	
	Cross	"	1	"
				1733-1745
Harvey J. Steffey,				
	Direct examination,	68	pages	
	Cross	"	57	"
	Re-direct	"	7	"
				1745-1877
Kitty E. Dwyer,				
	Direct examination,	11	pages	
	Cross	"	None	"
				1877-1889

Edward C. Smith,				
Direct examination,	54	pages		
Cross	"	None		1889-1943
R. Clyde Beach,				
Direct examination,	4	pages		
Cross	"	None		1943-1948
Edward C. Smith (recalled),				
Direct examination,	10	pages		
Cross	"	None		1948-1953
B. M. Gregory,				
Direct examination,	12	pages		
Cross	"	None		1972-1984
Edward C. Smith (recalled 2nd time),				
Direct examination,	7	pages		
Cross	"	13	"	2016-2040
Edward M. Lewis,				
Direct examination,	15	pages		
Cross	"	8	"	
Re-direct	"	4	"	2042-2069
Carrie D. Maris,				
Direct examination,	15	pages		
Cross	"	6	"	2069-2090
Benjamin F. Bashor,				
Direct examination,	9	pages		
Cross	"	1	"	2090-2100
Drury M. Gammon,				
Direct examination,	15	pages		
Cross	"	3	"	2101-2119
Michael J. Dowd,				
Direct examination,	10	pages		
Cross	"	2	"	2119-2131
Harvey J. Martin,				
Direct examination,	16	pages		
Cross	"	5	"	2131-2153

J. G. Fralick,			
Direct examination,	4	pages	
Cross	2	"	2196-2202
James T. Jolly,			
Direct examination,	21	pages	
Cross	12	"	2656-2689
Effe A. Jolly,			
Direct examination,	14	pages	
Cross	8	"	2689-2716
Mary A. Loney,			
Direct examination,	23	pages	
Cross	8	"	2717-2748
Charles E. Loney,			
Direct examination,	17	pages	
Cross	3	"	2745-2765
John E. Chapman,			
Direct examination,	13	pages	
Cross	16	"	2769-2798
Ivan R. Cornell,			
Direct examination,	33	pages	
Cross	28	"	2800-2861
Harvey J. Steffey (recalled),			
Direct examination,	7	pages	
Cross	9	"	2963-2979
Lon E. Bishop,			
Direct examination,	15	pages	
Cross	4	"	2979-3019
Charles Smith,			
Direct examination,	23	pages	
Cross	1	"	2995-3019
John C. Jensen,			
Direct examination,	10	pages	
Cross	8	"	3031-3049

Direct and Re-direct, 1406 pages.

Cross and Re-cross, 281½ pages.

This exclusive of the direct and cross examination of Clarence W. Robnett.

ATTEMPT TO DISTINGUISH BETWEEN THE PRESENT CASE AND THE CASE OF UNITED STATES VS. BARBER LUMBER COMPANY.

Counsel in his argument attempts to distinguish between the case at bar and the case of the United States vs. The Barber Lumber Company, and argues that Barber and Moon and the officers of the Barber Lumber Company were in the East, and did not come in contact with the individual entrymen. This condition is no different from the conditions surrounding the entrymen in the present case. Take for instance the Steffey Group. It is clear that none of these entrymen came in contact with the defendants. They lived at Pierce City; possibly a hundred miles from the City of Lewiston, (a large portion of the distance covered by stage only). The defendants had no opportunity to know the conditions surrounding their entries, and, therefore, the case under consideration here is no different in relation to the Steffey Group than the Barber Lumber Company case.

In the O'Keefe Group, comprising several entries, the entrymen resided at Cloverland, in the State of Washington, many miles from the City of Lewiston, (with no communication except by stage), and did not come in contact with the defendants. The defendants had no opportunity to know the facts and circumstances surrounding the acquisition of title to the land.

In relation to the Robnett Group, we call the Court's attention to the evidence of Joel H. Benton, appearing at page 667 of the record, wherein the witness testifies:

Q. I will ask you, Mr. Beaton, if during your talks with Mr. Robnett if he said anything to you about not letting Mr. Kester or Mr. Kettenback know of his purchasing the land, or of his arrangements with you?

A. He did, yes, sir; he told me several times he had no connection with them whatever; that he had nothing to do with them at all; it was on his own account.

Q. He was doing business on his own account?

A. On his own account, yes sir. He told me that several times.

Q. And what was his actions in regard to them not knowing what he was doing in regard to your land? State whether or not he tried to keep that from them, or talked with you where they couldnt hear you.

A. He did; he tried to keep it secret.

Q. He tried to keep it from them?

A. Yes, sir. He took me out in the directors' room, and didn't want anybody to hear what he was doing.

JOHN H. LITTLE

We also call the Court's attention to the evidence of John H. Little, page 1624 of the record:

Q. Then your arrangement with Robnett was not carried out?

A. No, it was not.

Q. And did you say that Kettenbach told you that he had nothing to do with Robnett's deal, or the sale that Robnett was to make of the land, or something of that sort?

A. Well, yes, if I remember correctly. It is all so long ago that the deal nearly all has gone from my mind, except just the main points of the case. * * * * *

To the same effect is this witness's evidence, appearing on page 1620 of the record.

CARRIE D. MARIS REXFORD

On page 2089 the witness Carrie D. Maris Rexford states that she had no understanding or agreement with either of the defendants, and testifies as follows:

Q. Now, at any of these times when you entered the bank to see Robnett you had no conversation with Kester or Kettenbach, did you?

A. Never. Clarence Robnett is the only one I ever had any dealings with at all.

Q. Did he make an effort to have his conversations out of the presence of Kettenbach and Kester?

A. Well, I don't know that these gentlemen were ever present at the conversations at all. Now, possibly,—I couldn't tell you,—possibly they were in the bank when he handed me out that money; but I never had any dealings with them, and whoever it was behind there in the bank I would pass the time of day.

Q. You never had any agreement or understanding that you would sell your land to Kester and Kettenbach?

A. Never. That was never mentioned. * * * *

DRURY M. GAMMON

On page 2111 the witness Drury M. Gammon testifies:

Q. Mr. Gammon, you never had any arrangement or agreement with Kester or Kettenbach regarding your claim, did you.

A. No, sir.

Q. You never had any conversation with them at all?

A. No, sir.

Q. Neither of these gentlemen were present at any time when you talked with Clarence Robnett regarding it?

A. No, sir.

COLBY & EMERY GROUP

The record shows that these entrymen all live on the North Fork of the Clearwater River, with no means of transportation except by pack horses or team many miles from the City of Lewiston, and in a place where they would not ordinarily come in contact with the defendants.

These various groups comprise practically all the claims about which there appears to be any question, and it appears to us that the defendants had little or no more opportunity to come in contact with the entrymen than did the defendants in the Barber Lumber Company case.

The defendants all testify that they knew nothing about the dealings of Robnett, or his negotiations or transactions with the entrymen; that it was never brought to their attention, and the evidence of the witnesses hereinbefore referred to bears out that contention and strongly corroborates the evidence of the defendants in that respect.

SPECULATION

On pages 278 to 290 of appellant's brief is an argument and discussion under the heading of "Speculation." Counsel sets forth the argument appearing in the Congressional Record, relative to the enact-

ment of the Stone & Timber Law, and wherein certain features of the law were debated, especially the speculative feature of the same. From an examination of these debates quoted, and the record in relation to the arguments in support of and against the enactment of the law, it appears that the discussions quoted were all prior to the amendment of the bill striking out the provisions that the applicant should swear that he was not seeking the land for the purpose of selling it. Page 285 of appellant's brief shows clearly that Congress eliminated the proposed amendment embodying the provision that the land should not be taken for sale. Under the provisions of the Williamson Case, the Budd Case, the Barber Lumber Company case, and other decisions, the courts hold the entryman has a perfect right to take the land with a view to selling it, if he desires, subsequent to the time he files his sworn statement. The argument of counsel in relation to the speculative feature of the case is not in point, and does not sustain his contention. The record of Congress produced is conclusive that Congress refused to prohibit an application with a view to sell, provided no agreement for sale prior to filing the application is made. If the transaction is free from any contract or arrangement for sale at that time, direct or in-

direct, and is not then taken for the use and benefit of another, it is not taken for speculation within the meaning of the law as finally enacted. Any speculation resulting from a transaction taking place after the filing of the application is not prohibited.

It seems that counsel has shifted his position from a prior agreement, and from an effort to acquire more land than the law allows to one person, or more than one, to the question of speculation. The appellant started on one theory when this litigation was instituted, (agreement prior to final proof), shifted to another in the trial and the argument in the lower court, (agreement prior to application, and excess acquisition), and then shifts to another in this court. The Williamson and Biggs cases caused the first shift, and the Barber Lumber Company Case caused the second and last to the doctrine of speculation.

Since it is permissible to take the land though with a view to selling it, where there has been no arrangement to sell, the law cannot condemn such a taking on the ground it is speculative. Then what is counsel's definition of the speculation prohibited? Ours is that only *that* speculation is prohibited, which the Statute and the Supreme Court's definition of it prohibits, viz., any speculation rooted in an arrange-

ment in existence at the time of filing. There is no prohibition of any speculation connected with any subsequent deal. A speculation consists of a deal of some kind for profit—some being so bald as to be prohibited, as gambling, or a lottery, and others shading down through every degree to almost every act of buying or investing in anything with hope of profit. The statute draws the line only upon any arrangement existing at the time of filing.

Whatever may have been said in the early debates, while the bill prohibited taking with a view to sale, and limiting to acquisition for use only for fencing, mining, building, etc., etc., when the prohibition against sales was stricken out, there remained nothing to prevent a *subsequent* sale.

“Every interest in lands is the subject of sale and transfer, unless *prohibited by statute*, and *no words allowing it are necessary*.”

St. Louis Smelting & Refining Co. vs. Kemp
104 U. S. 636-657
26 L. Ed. 875, 882.

Counsel relies upon the dissenting opinion of Justice McKenna in the case of Haffmann vs. Gross, 199 U. S. 342-349.

As sustaining his contention in regard to speculation. This citation appears at page 289 of appellant's brief. In the dissenting opinion of Justice Mc-

Kenna the justice held that it was unlawful to make the agreement to sell prior to filing, and that the agreement in that case was so made and in violation of the pre-emption law. The majority of the court held the agreement was not in violation of the pre-emption law and that the same should be enforced.

On page 318 of appellant's brief counsel states:

"There was nothing irrational in Robnett telling Kettenbach the condition upon which he had procured Benton to make the entry, as they were all engaged in the same business—the procuring of timber claims unlawfully; and all were acting in concert in that business."

The foregoing statement is unsupported by the evidence. It conclusively appears that Robnett had no connection with the defendants whatever, and the defendants did not procure timber claims unlawfully. The evidence of the Government's own witnesses shows that upon various occasions Robnett concealed his transactions from the defendants, and stated to witnesses that he had no connection with the defendants whatever. Robnett also testified to the same state of facts when he appeared as a witness in the criminal cases hereinabove referred to. Robnett's evidence that he was connected with the defendants is denied by all of the defendants and also by disinterested witnesses who appeared not only for the defendants but for the appellant as well.

The statement appearing on page 318 is unwarranted and unsupported by the evidence.

KINSFOLK OF KESTER AND KETTENBACH

On page 326, under the heading "Kinsfolk of Kester and Kettenbach who hold titles in trust for them," appears the names of various entrymen who have never transferred their claims to the defendants, or either of them. Counsel contents himself with the broad statement that they are holding these claims in trust for the defendants. There is not a particle of evidence to support it, and the question of paying taxes upon the land, or of accompanying the entrymen and entrywomen to the land, is insufficient to warrant the cancellation of the titles. Then, it appears that upon various occasions money was sent to the Lewiston National Bank for the payment of taxes and as the defendants Kester and Kettenbach were connected with the Lewiston National Bank, the same were paid by them in that way.

IMPEACHMENT OF WITNESSES

On page 344 of appellant's brief appears the following statement:

"In view of what has been said, showing the conceded hostility of the Government witnesses to the Government, their bias in favor of the defendants, which is disclosed throughout the cross-examination, the Government was frequently surprised in its direct examination, it is clear that counsel for complainant were entitled to cross-examine the witnesses called by them."

The record does not show that a single witness was hostile to the Government. As was said in the Barber Lumber Company case, the only reason they might appear to be hostile is because their evidence did not sustain the appellant's contention. When a witness's evidence did not sustain appellant's contention, it was then that counsel proceeded to cross-examine the witness and attempt to impeach him in various ways. The record does not justify the action of counsel, nor sustain counsel's contention that he was entitled to even lead the witnesses, much less cross-examine and attempt to impeach them.

FINAL PROOFS

Counsel contends that he was justified in violating the rule announced in the Williamson Case, the Biggs Case, and others, and in introducing the final proofs as evidence and the statement of the wit-

nesses given upon final proof, and it is with this evidence that counsel sought to impeach his own witnesses and endeavor to induce them to testify in accordance with appellant's contention. If the decisions in the Budd Case, the Williamson Case, the Biggs Case and the Barber Lumber Company Case are to be followed, the admission in evidence, over the defendants' objection, of the final proof papers and evidence of the witnesses given upon final proof, was error.

We respectfully submit that the decree of the district court should be affirmed.

GEO. W. TANNAHILL,

Attorney for Appellces

William F. Kettenbach, George H. Kester,
William Dwyer, Elizabeth White, Edna P.
Kester, Martha E. Hallett and Kitty E.
Dwyer.

Nos. 2209, 2210, and 2211.

**In the United States Circuit Court of
Appeals for the Ninth Circuit.**

No. 2209.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
CLARENCE W. ROBNETT, WILLIAM DWYER, AND
FRANK W. KETTENBACH, APPELLEES.

No. 2210.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
CLARENCE W. ROBNETT, WILLIAM DWYER, THE
IDAHO TRUST COMPANY, A CORPORATION; THE
LEWISTON NATIONAL BANK, A CORPORATION; THE
CLEARWATER TIMBER COMPANY, A CORPORATION;
ELIZABETH W. THATCHER, CURTIS THATCHER,
ELIZABETH WHITE, EDNA P. KESTER, ELIZABETH
KETTENBACH, MARTHA E. HALLETT, AND KITTY E.
DWYER, APPELLEES.

No. 2211.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

WILLIAM F. KETTENBACH, GEORGE H. KESTER,
AND WILLIAM DWYER, APPELLEES.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF IDAHO, NORTHERN DIVISION.*

REPLY BRIEF ON BEHALF OF APPELLANT.

FILED

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In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA,
appellant,
v.
WILLIAM F. KETTENBACH, GEORGE H.
Kester, Clarence W. Robnett, Wil-
liam Dwyer, and Frank W. Ketten-
bach, appellees. } No. 2209.

THE UNITED STATES OF AMERICA,
appellant,
v.
WILLIAM F. KETTENBACH, GEORGE H.
Kester, Clarence W. Robnett, Wil-
liam Dwyer, The Idaho Trust Com-
pany, a corporation; The Lewiston
National Bank, a corporation; The
Clearwater Timber Company, a cor-
poration; Elizabeth W. Thatcher,
Curtis Thatcher, Elizabeth White,
Edna P. Kester, Elizabeth Ketten-
bach, Martha E. Hallett, and Kitty
E. Dwyer, appellees. } No. 2210.

THE UNITED STATES OF AMERICA,
appellant,
v.
WILLIAM F. KETTENBACH, GEORGE H.
Kester, and William Dwyer, appellees. } No. 2211.

REPLY BRIEF ON BEHALF OF APPELLANT.

Three briefs on behalf of the appellees have been
filed in these cases. Mr. Tannahill filed an original

brief and also a supplemental brief on behalf of appellees William F. Kettenbach, George H. Kester, William Dwyer, Elizabeth White, Edna P. Kester, Martha E. Hallett, and Kittie E. Dwyer. Mr. Babb filed a brief on behalf of appellees Frank W. Kettenbach, Clearwater Timber Company, Idaho Trust Company, Lewiston National Bank, and Potlach Lumber Company.

For the convenience of the court and in order to avoid confusion, these briefs will be referred to herein as Tannahill's original brief; Tannahill's supplemental brief; and Babb's brief.

The briefs of appellees present to the court the facts in a form to magnify isolated, minor and immaterial circumstances, to distort the evidence, and to virtually conceal the essential form and substance of the evidence as it was presented before the special examiner. As a result the court gets therefrom only a confused and fragmentary picture without the perspective which is apparent when the entire evidence is viewed. Furthermore, in them the good faith of counsel and other representatives of the Government is assailed both in the conduct of the cases in the lower court, and also in the presentation of them to this court.

It will be noted that the principal appellees in these cases have been before this court on two other occasions (in the Lewiston National Bank cases, and the Land Fraud cases) in the past few years, and that each time they were represented by counsel, one of whom appears for them in the present cases; that

though the counsel, special agents, and many of the witnesses for the Government in said cases were not the same, the records show that affidavits were filed on behalf of appellees in both of them in an effort to show that the representatives of the Government had endeavored improperly to influence both juries; that in both of said cases said appellees were able to secure witnesses who testified that certain of the Government's witnesses had made statements in their hearing contrary to what they testified at said trials, and produce affidavits they had obtained from the Government witnesses containing statements at variance with their sworn testimony; and an attempt was made to show that the counsel and other representatives of the Government threatened or intimidated or otherwise improperly influenced the witnesses who testified in its behalf, all of which, however, met with small success. Notwithstanding the futility of such practice a similar system has been engaged in on behalf of the appellees mentioned in the present cases. Whether counsel think this proper forensic tactic or the ethics of legal practice we feel confident that in this court the course thus pursued will defeat its own purpose and by reason of the character of the proof offered to that end it will fall of its own weight.

The Government's original brief gives a statement of the facts relative to each entry and the pages of the record upon which the evidence in support thereof appears are cited. It is not pretended that everything that every witness said in connection

with the entries is mentioned, but a fair statement of the evidence affecting each entry is made and the true facts are frankly met and discussed.

APPELLANT SHIFTS POSITION.

It is contended by appellees that the Government has abandoned the contention urged upon the lower court that the timber and stone act is violated if one person acquires more than 160 acres of timber land, and that the Government has shifted from the position taken in the trial court that the proof showed that the entries were made pursuant to antecedent agreements, to the claim that they were made upon speculation and that that view of the cases was not presented at the trial, but for the first time in this court.

(a) We insisted in the lower court that the evidence was sufficient to show that the appellees conspired to acquire through the timber and stone act an area of land greatly in excess of the amount and area which they could lawfully acquire either individually or collectively as charged in the bills of complaint, and that they procured the entrymen to make entries in pursuance of the conspiracy, the purpose being to defeat the letter as well as the spirit of said act by using the agencies of the second section of said act to defeat the prohibitions of the first section thereof, and that appellant was entitled to the relief sought even though the entrymen did not swear falsely in making their initial application.

United States v. Trinidad Coal Co. 137 U. S., 160.

United States v. Keitel, 211 U. S., 370.

In the Barber Lumber Company case (172 Fed., 948), Judge Bean said:

That it is a fraud upon the Government for an individual or an association of individuals to undertake to acquire a larger area of public land under the act referred to than such a party or association are entitled to in their own right, may be conceded.

As this court in deciding the same case on appeal (194 Fed., 31) did not consider the contention sound it was not urged upon the court again in the present cases.

(b) Appellant maintains that the evidence in the present cases shows that some of the entries were made pursuant to antecedent agreements, that others were made upon speculation and that still others were made both upon an understanding and agreement and also upon speculation.

(c) Counsel are in error in stating that the relief sought because of the speculative feature of the entries was urged for the first time in this court. In the lower court we contended that even though the evidence should not warrant the conclusion that a conspiracy between the appellees and others had been entered into, if it showed that the entrymen applied to purchase the tract by him or her sought to be entered, on speculation, and not in good faith to appropriate the same to his or her own exclusive use and benefit, and that the appellees or their agents knew of that fact, as to such entries the Government was entitled to the relief prayed.

SPECULATION.

We have discussed this feature of the cases in our original brief (pp. 278-290) and urged that the Supreme Court in deciding the Budd and other cases arising under the timber and stone act had not considered the speculative feature of the entries denounced by the act, and that the expressions in said cases that seem to dispose of that question are *obiter dicta* as that particular phase of the statute was not before the court nor necessary of comment in deciding the cases.

It has been held that—

The opinion of a court can not be relied upon as a binding authority, unless the case called for its expression.

Re City Bank of New Orleans, 3 How., 292; that—

Where a point has not been contested in a former decision the court is not bound by views expressed therein.

Cross v. Burke, 146 U. S., 82; that—

An expression of opinion upon a point not decided by the court is a mere dictum, lacking the force of a judicial determination.

McCormick Harvesting Machine Co. v. C. Aultman Co., 169 U. S., 606; that—

The doctrine of *stare decisis* is a salutary one, but it only arises in respect of decisions directly upon the point in issue.

Pollock v. Farmer's Loan & Trust Co. (Income Tax case), 157 U. S., 429—

See also *Bardes v. First Nat. Bank*, 178 U. S., 524.

Harriman v. Northern Securities Co., 197 U. S., 244;

Cohen v. Virginia, 6 Wheat., 264;

Plumley v. Mass., 155 U. S., 461;

Northern Nat. Bank v. Porter Twp., 110 U. S., 608.

Counsel for appellees contend that the discussion in Congress relative to the speculative feature of entries to be made under the timber and stone act "were prior to the amendment of the bill striking out the provisions that the applicant should swear that he was not seeking the land for the purpose of selling it." (Tannahill's Sup. B., 45.) The present bill as it passed both Houses of Congress was not an amendment of any other bill, but was in the same language as the bill that had passed the Senate at the preceding Congress except the words "and not for sale" were not contained in the bill. Thus the applicant had to swear, among other things, "that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit (and not for sale)," the other requirements of the applicant being the same in both bills. It seems clear that the purpose of the act was to allow persons who had need for timber lands in connection with their farms, mines, or other industries to acquire the same, but the entries were not to be made for the purpose of speculation or for the use and

benefit of any person but themselves, without any restriction upon them, however, as to the disposition of the land after they had acquired the title thereto. If at the time a person made application to enter a timber claim he had no agreement that the title he should acquire should inure to the benefit of another, or that he had not determined to enter the claim merely on speculation, the statute has not been violated. Had the words "and not for sale" been incorporated into the present act they might have restricted the sale of the claim under any circumstances at any time. These words, however, were omitted from the present act, but the word "speculation" is incorporated therein as it was in all the other proposed statutes on the subject, and it must be concluded that Congress meant that the word should have some significance, and it is even more apparent that it did so intend by reason of its omission of the words "and not for sale" which appear in the second succeeding line after the word "speculation" in the proposed act that failed of passage.

In further support of the contention that the word "speculation" has a significant bearing upon the statute and of the intention of Congress in not eliminating it from the bill we cite the case of *Williamson v. United States*, 207 U. S., 425, 459.

The court after stating that one of the requirements of section 2 of the timber and stone act is that the applicant shall declare that he makes the application not for the purpose of *speculation* but in good faith,
* * * said:

“Examining the items (of the third section) which the statute requires the applicant to make proof of, after showing publication, it is apparent that while some of the things referred to in the prior section, and which are required to be stated in the preliminary proof are reiterated, all requirement is omitted of any statement regarding a *speculative purpose* on the part of the applicant, his *bona fides*, and his intention to acquire for himself alone. When the context of the statute is thus brought into view we are of the opinion that it can not possibly be held without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at the final hearing, of the declaration concerning his purpose in acquiring title to the land, since to do so would be to construe the statute as including in the final hearing that which the very terms of the statute manifests were intended to be excluded therefrom. We say this, because as the third section reexactes in the final application a reiteration of some of the requirements concerning the character of the land made necessary in the first application and omits the requirement as to the *bona fides*, etc., of the applicant, it follows under the elementary rule that the inclusion of one is the exclusion of the other, that the reexacting of a portion only of the requirements was equivalent to an express declaration by Congress that the remaining requirements should not be exacted at the final proof. And *this becomes particularly cogent when the briefness of the act is considered, when the propinquity of the two provisions is borne in mind*, a propinquity which excludes the con-

ception that the legislative mind could possibly have overlooked in one section the provisions of a section immediately preceding, especially when in the last section some of the requirements of the prior section are reexpressed and made applicable to the final statement. * * * These conclusions are directly sustained by a recent ruling in *Adams v. Church*, 193 U. S., 510, construing the timber culture act. Under that law an applicant for entry was obliged, among other things, in making his application to swear to his *good faith* and its *absence of speculative* purpose, in the exact words of the statute now under consideration."

ANTECEDENT AGREEMENTS.

We have discussed a number of the cases arising out of entries made under the timber and stone act pursuant to a prior agreement (Gov. brief, 252-278), but in addition to those, is the case of *United States v. Belts*, 192 Fed., 708, 711, in which Judge Wolverton said:

The defendant denies that there was any previous agreement or understanding with any of these parties to purchase their land when title was acquired by them. If it be that there were no such express agreements, there must have been a tacit agreement in each case. Defendant was the only person vitally interested in procuring the titles, and he was paying all the expenses, even to the extent of the purchase price of the land from the Government; and was it not expected, and even understood, that he was finally to acquire the title by purchase from

the entrymen, and this on an understanding reached at or before the time the entries were made? *It seems not within the bounds of reason that it could be otherwise;*

and also *United States v. Smith*, 181 Fed., 545, 549, in which Judge Bean said:

It is true that there was no express agreement with the several applicants in either case that the entries should be made for the use and benefit of another, but it is *the effect of the entire testimony*. As Puter states in his testimony the conspirators studiously avoided entering into such an express contract or agreement, for they knew that it would be such an evidence of fraud as would invalidate the entry, but caused it to be reported, and the applicants to be advised by other parties, that if they would make the applications they would receive upon making final proof the stipulated sum, and they acted on such understanding in making the application and subsequently conveying the property as directed by Puter and McKinley and Mealey.

The entrymen in this case also gave mortgages to secure the money advanced. The latter case was affirmed and the finding of facts therein approved by this court in *United States v. Smith et al.*, 196 Fed., 593, 595.

SPECULATION AND ANTECEDENT AGREEMENTS.

In addition to what is shown throughout our original brief in regard to the appellees' purpose and

intention of acquiring timber lands, the trial court in referring to the matter, said:

Upon the one hand, it is undoubtedly true that the defendants were acquiring timber lands, and were lending encouragement and assistance to qualified entrymen, with the hope at least that they would be able to purchase the title after it passed from the Government into private ownership. At least in some quarters of the community the belief prevailed that so long as there was no contract in writing, a verbal agreement or a tacit understanding was not in violation of the law; and we are not without evidence of the fact that the idea was more or less generally entertained that so long as the entryman was qualified and the Government was being paid the price which it asked for the land no wrong would be done by an evasion of the technical requirements of the law. (R., 363.)

Again the court said:

That O'Keefe was actuated both by a feeling of friendliness to the entryman and by the hope, if not the expectation, that sooner or later Kester and Kettenbach would be able to acquire title to the claim and that he would receive a commission or compensation in some other form, and that Kester by reason of his business relations with O'Keefe and *his hope of securing title to the claims sooner or later*, permitted O'Keefe to draw from the funds of the bank in excess of the credit which would ordinarily be extended, * * *. (R., 331.)

The court also said:

Unquestionably, O'Keefe got the money at the Lewiston National Bank for the entrymen, and it is wholly probable that the defendants Kettenbach, Kester, and Dwyer knew that it was being furnished for the purpose of paying the expenses of and making final proof upon the entry. (R., 329.)

And, further, in commenting upon the Robnett group, the court said:

The understanding, as I gather it from all the evidence and the circumstances disclosed by the record, including the statements of the several parties, is that Robnett, in encourgaing these men to make entries led them to believe that he would be able to negotiate a sale of the lands after title was secured, so that they would realize a substantial profit, and in that belief they entered the lands and assumed the mortgage obligations referred to. (R., 323.)

Apart from the evidence set out in our original brief in connection with each entry showing that they were made pursuant to prior agreements and on speculation, the evidence quoted in the brief of the appellees (Tannahill's orig. B., pp. 6 to 141) shows that the claims in connection with which the quotations are made were entered in such instances pursuant to prior agreements, others upon speculation, and others pursuant to prior agreement and also on speculation. It must be borne in mind that many, if not almost all, of the entrymen forming the Robnett group, the O'Keefe group,

the Steffey group, and others, testified to the effect that they entered the claims for the purpose of selling them to make a profit. As to a number of them, the approximate date of the sale and the amount of profit was mentioned, and in some the sale was guaranteed, and the money to initiate and perfect the entries was furnished as heretofore shown. If it could be held that in such circumstances such entries were not made upon speculation in violation of the statute, and that the other evidence relative to the entries was not sufficient to justify the finding that they were made pursuant to prior agreements, what would prevent an agent of a timber company, his principal not being disclosed, in inducing any number of persons to enter timber claims, and to say to them that they will be able to sell them within a stated period; and furnish them a part or all of the money to purchase the land and then have his principal negotiate for the purchase of the lands or negotiate the sale of them himself to his principal? Surely claims entered under such conditions would be in fraud of the statute.

**WITNESSES HOSTILE, RELUCTANT AND INTERESTS
ADVERSE.**

Appellees contend that the only hostility evinced by the witnesses on behalf of the Government was that they failed to testify in support of the charges made in the bills; that the Government is unqualifiedly bound by all the testimony of its witnesses and that in urging that some of their statements

are inherently improbable or contrary to other proven facts and established circumstances is an attempt to impeach them.

This subject is discussed in our original brief on pages 255 to 257, 340 to 350. Further on the same subject, the trial court mentioned the fact that Wilson was a reluctant witness (R., 286) and that the entrymen forming the Steffey group were also reluctant witnesses (R., 351).

It was held in *Dravo v. Fabel*, 132 U. S., 487, 490, that "while the plaintiffs were not concluded by their (plaintiff's witnesses) evidence and might show that they were mistaken it could not be properly contended by the plaintiffs that they were unworthy of credit. The evidence must be *given such weight as under all the circumstances it is fairly entitled to receive.*"

In *United States v. Barber Lumber Co.*, 172 Fed., 948, the court held that while of course the Government was not concluded by the testimony of its own witnesses, it could not insist that they were unworthy of belief or that their testimony should be entirely disregarded and that unless self-contradictory and inherently improbable it must necessarily prevail in the absence of countervailing evidence.

The testimony of the entrymen Bashor and Joel H. Benton and a number of the entrymen forming the O'Keefe group is very significant. Bashor testified on behalf of the Government as follows:

Q. Now, did you have any talk with Will Kettenbach about this claim?

A. About the land?

Q. Yes.

A. No, sir.

Q. Never on any occasion?

A. No, sir. All the conversation was done through Mr. Robnett; there was nothing between Kettenbach and I.

Q. Didn't you meet Mr. Will. Kettenbach on the train one day and have a talk with him?

A. Well, I was thinking—yes, it was Kettenbach, too; I was thinking at a time since, but it was Kettenbach. I met him on the train as I went to Moscow, it seems.

Q. What did he say then?

A. I told him I had just received a letter from Robnett with reference to the timber land, and he wanted me to give him a deed to that to properly satisfy the note and mortgage. I told him Robnett wanted me to turn it over to Kettenbach; the letter was from Robnett and I had just received it a few days before meeting Mr. Kettenbach on the train.

Q. What did Kettenbach say to you?

A. He told me to take it up with Robnett when I got back home. I told Mr. Kettenbach I wouldn't take it.

Q. What did Kettenbach say he was giving for those claims, over and above the notes?

A. About \$30.00, that was about what it amounted to. I think he was offering me a \$1,000.00, but that is about what it amounted to—\$30.00 above notes and interest. That was 2 years and $\frac{1}{2}$ though after final proof was made."

This shows the reluctance of the witness to testify freely, and a disposition to eliminate Kettenbach as much as possible from any connection with the transaction; and that Robnett was acting for Kettenbach in the timber transactions, and that whereas in fact he was getting but \$30.00 out of the transaction, he desired to make it appear that the claim brought \$1,000.00, and volunteered the statement that the transfer was 2½ years after proof was made. The evidence of this witness also shows, as does the evidence of the other entrymen who gave notes or mortgages for the money advanced, the method pursued by Kester, Kettenbach, and Robnett to compel the entrymen to comply with the unlawful agreements they had with them. Thus they would advance a little over \$400 to the entrymen and take a note from them of \$700 to \$750 with interest at 12% per annum. The note and interest in a short time would amount to between \$800 and \$1,000. In many instances that amount was more than the claim would readily sell for. Demand would then be made for the payment of the note and foreclosure threatened. Sometimes Kester and Kettenbach would suggest that the entryman should endeavor to sell his claim to some one else. In one instance it was suggested that the entryman pay \$5.00 a month on account. The entryman under the conditions stated being unable to make a quick sale of the claim and fearing the expenses of foreclosure and a deficiency judgment against him, or appreciating the fact that a payment of \$5.00 a month would not even pay the interest on

the note, would naturally convey the claim to Kester and Kettenbach on whatever terms they imposed. For the purpose of impeaching Robnett appellees (Tannahill's orig. B., 97) quote from the cross-examination of Joel H. Benton as follows:

Q. I will ask you, Mr. Benton, if during the talk with Robnett if he said anything to you about not letting Kettenbach or Kester know of his purchasing the land, or of his arrangements with you?

A. He told me several times he had no connection with them whatever, that he had nothing to do with them at all; it was on his own account.

Q. And what was his action in regard to them not knowing what he was doing in regard to the land? State whether or not he tried to keep it from them, or talked with them or where they could hear you.

A. He did; he tried to keep it secret.

Q. He tried to keep it from them?

A. Yes, sir; he took me out in the directors' room and he did not want anybody to hear what he was doing.

The testimony of this witness, given at the pages referred to in the Government's brief, shows his hostility to the Government and his bias in favor of the appellees. The portion of his testimony here quoted is inherently improbable when you consider the fact that the Robnett entrymen conducted practically all of the arrangements in connection with their entries with Robnett at the bank, some of them being there 4 or 5 times for that purpose; that Robnett obtained

from Kettenbach the money for 11 of them to make proof, and purchase the land, and that Robnett negotiated the transfer of the entries to Kettenbach.

The lower court found that O'Keefe in procuring the entrymen forming his group to make entries and furnishing the money therefor was actuated not only by the hope that he would later acquire the title to their entries for Kester & Kettenbach, but by a feeling of friendliness toward the entrymen. The testimony of the entrymen was to the effect that O'Keefe was extremely friendly toward them and that his disposition and impulses were such that he would go a great length to befriend a person whom he liked and that he would have advanced to them the money to initiate and perfect their entries even though he had no expectation of obtaining the titles to the claims they entered. They also testified that when they conveyed their claims to O'Keefe that he assured them that they were executing merely a bond for a deed and that they could redeem the same at any time during the life of the notes they had given to him, when in fact they executed warranty deeds. Thus in one breath they would lead one to believe that O'Keefe was a good and unselfish man and in the next that he was a scamp and would impose upon his near relative and close friends. The testimony of the said witnesses in this respect is inconsistent, and the fact that all of them executed warranty deeds to O'Keefe either the day after or within 4 or 5 days after making their proofs, and that O'Keefe in turn conveyed the claims thus

acquired to Kester and Kettenbach within a week thereafter, which deeds the latter withheld from the record for a year and a half, together with the other facts and circumstances surrounding the making of the entries as set forth in the Government's original brief (see discussion "O'Keefe Group" Government brief 133 to 160 and 178 to 190), renders their testimony in this respect inherently improbable.

In our original brief (p. 255) we urged that the fact that many of the entrymen denied on cross-examination that they made agreements antecedently to making their applications does not go far in any instance to show that agreements in fraud of the statute did not exist; and that all of the entrymen were disposed to put the fairest face possible upon their conduct and the more so in cases where their conduct was felt to be compromising; and that most of the entrymen were manifestly well disposed towards, if not actively sympathetic with the defense. Having the proper regard for the purpose of cross-examination and the reasons that make leading questions ordinarily permissible thereon we still contend that the Government's cases should not depend solely upon what the witnesses called on its behalf testified to on cross-examination. So whether or not any one of the entrymen have entered into such an arrangement as is forbidden by the statute is not to be established entirely by what he says in response to a question framed in the words of the statute and admitting of a categorical answer, but is to be inferred from the arrangement as it is

proved and the testimony of the Government witnesses who are entrymen should be weighed like other testimony with reference to the inherent reasonableness of what they say and the harmony of the facts to which they testify with the other facts established in the case, and also with reference to the considerations of self interest and self protection pressing upon said witnesses. In view of the attitude and disposition of the entrymen who were called as witnesses for the Government, it was improper for counsel for the appellees upon cross-examination to lead them and to put words in their mouths as they did. On the other hand the record will disclose the fact that Government counsel was justified in asking leading questions of the Government's witnesses and in cross-examining them, in many instances.

Professor Wigmore, in his work on Evidence, discussing the rule on the cross-examination of one's own witnesses and of leading a friendly witness on cross-examination, says:

The typical situation in which the witness's presumable bias removes all danger of improper suggestion is that of opponent's witness under cross-examination. The purpose of the cross-examination is to sift his testimony and weaken its force, in short, to discredit the direct testimony; thus, not only the presumable bias of the witness for the opponent's cause, but also his sense of reluctance to become the instrument of his own discrediting, deprive him of any inclination to accept the cross-examiner's suggestions unless the truth forces him to.

Accordingly, it is well settled that in cross-examination of an opponent's witness, *ordinarily* no question can be improper as leading. Appleton, C. J., in *State v. Benner*, 64 Me., 279: "Cross-examination of an opponent's witness (in leading form) is allowable. Why? Because being called by him (the opponent) it has been imagined that there was some tie of sympathy or interest which would induce partiality on the part of the witness in favor of the party who called him." (Sec. 773, Wigmore Evidence.)

Yet, when the reason ceases, the rule ceases also; thus, when an opponent's witness proves to be in fact biased in favor of the cross-examiner, the danger of leading questions arise and they may be forbidden. Appleton C. J., in *State v. Benner* (supra) said: "If the witness is from any cause adverse to the party calling him, the same reason which authorizes and sanctions cross-examination, more or less rigorous, equally requires it when the party finds that the witness whom the necessities of his case have compelled him to call is adverse in feeling, is reluctant to disclose what he knows, is evasive or false. Important as interrogation may be, if the witness is friendly, to remove uncertainty and indistinctness and to give fullness and clearness, doubly important is it, if the witness be dishonest and adverse, to extract from reluctant lips facts concealed from sympathy, secreted from interest, or withheld from dishonesty. Cross-examination may be as necessary to elicit the truth from one's own witness as from one's opponent's witness." (Sec. 774 Wigmore.)

STEFFEY GROUP OF ENTRIES.

The lower court held that the entries forming this group were made pursuant to agreements between Steffey and the entrymen, but that Kester and Kettenbach acquired title to the same as innocent purchasers. The discussion of these entries will be found at pages 203 to 238 of our original brief, and our argument as to whether Kester and Kettenbach were innocent purchasers is set out under the heading, "Innocent purchaser," at pages 291 to 304, Government's original brief. The discussion of these entries on behalf of the appellees (Tannahill's original brief, 53 to 94), read in connection with the portion of the Government's brief, will convince the court that said entries were made in fraud of the statute, and that Kester and Kettenbach acquired title to the same with knowledge of their infirmities. The lower court found that the conversation relied upon by the Government as constituting the agreement between Dwyer and Steffey that the claims should be entered for the use and benefit of the appellees did not take place until after Dwyer had looked at the claims of Mrs. Jolly and Mrs. Loney, and that Dwyer had not viewed these claims until after they were filed upon, and only one claim was entered after the filing of these claims. (R., 357, 358.)

The court is in error in this as shown by the table and the pages of the record cited at page 231 of the Government's brief. It is shown that four entries forming the said group were made after the filing of the application of Mrs. Loney and Mrs. Jolly,

namely, Charles E. Loney, James T. Jolly, Clinton E. Perkins, and Frank J. Bonney. As further corroboration of Steffey's testimony that the agreement between Dwyer and himself to procure the entrymen to enter the claims for the use and benefit of petitioners pursuant to prior agreements was made before any of the entrymen had initiated their entries, the record shows that each of the entrymen, except Charles S. Myers and Frank J. Bonney, gave the name of Dwyer as one of his witnesses in the notice of publication which he was required to give the day he made his original application. (Notice of publication of James T. Jolly, April 3, 1906 (R. 3966); J. T. Jolly, March 23, 1906 (R. 3971); Mary A. Loney, March 23, 1906 (R. 3975); Charles E. Loney, April 3, 1906 (R. 3978); Jannie Myers, March 19, 1906 (R. 3825); and Clinton E. Perkins, April 19, 1906 (R. 3845).) The witnesses thus published, at final proof would be inquired of as to whether the land was occupied or had any improvements on it, and whether the same was more valuable for mineral for any other purposes than for the timber or stone thereon, or whether it was chiefly valuable for its timber or stone. (R. 3973). Of course, said entrymen would not have named Dwyer as a witness in their notices of publication unless he had been suggested by Steffey, and it is manifest that Steffey would not have suggested Dwyer as a witness unless he knew that he had been over the lands and was acquainted with their character and was qualified to give the information at final proof. There is no

question that Dwyer knew all about the Charles Myers claim which was the first of the group entered, as he had contested that claim after it was entered as a homestead and the contest settled by relinquishment before Myers filed. Dwyer appeared as a witness on behalf of Clinton E. Perkins when he made final proof. (R., 3845.)

It is contended by appellees (Tannahill's orig. B., 87-89) that Kester testified that the consideration mentioned in the deeds made by the Steffey entrymen was actually paid by Kester and Kettenbach, because Kester testified to that effect. The lower court also relied upon this testimony as showing that Steffey's testimony was thereby contradicted and that Steffey had made a large profit out of each claim, as he had testified that he had furnished each of the entrymen less than \$500 to perfect his entry and had given each of them about \$200 over and above the amount advanced for their services, and that he had therefore appropriated to his own use the difference between those amounts and the amounts mentioned in the deeds. A reading of the record (pp. 3173, 3174) will show that each deed was presented to Kester and that he was asked by his counsel to look at the deed and tell what amount he paid Steffey for the claim conveyed by the deed he held in his hand, and in each instance he mentioned the consideration set out in the deed. Such testimony coming from an interested witness and one so thoroughly discredited as Kester does not seem to go very far in proving anything.

O'KEEFE GROUP OF ENTRIES.

As to the entries forming this group the lower court held that if the same had been fraudulently entered Kester and Kettenbach would be chargeable with notice by reason of the relations that existed between them and O'Keefe. A discussion of these entries appears at pages 133 to 160, 178 to 187, 237, Government's brief.

It is to be borne in mind that Kester and Kettenbach withheld the deeds to these claims from the record for one and one-half years after they were made and as was said by this court in *Linn-Lane Timber Company v. United States*, 196 Fed., 597 "the fact that a deed is withheld from record or is otherwise concealed is a badge of fraud."

We feel confident that the court will hold that the entries forming this group were made in fraud of the statute, and that Kester and Kettenbach acquired title to the same with notice of the fraud and are not innocent purchasers.

HANSEN ENTRY.

The facts concerning this claim are set out at pages 57 to 60 of the Government's original brief and clearly show that the same was fraudulently entered. The bill of complaint charges that the Hansen entry was conveyed to appellee Kettenbach subject to a mortgage given to Curtis Thatcher, but that said deed to Kettenbach has not been recorded, and that the entry was unlawfully made, and in furtherance of

the conspiracy therein charged. (R., 4278, 4279.)
In his answer petitioner Kettenbach admits—

that the said Soren Hansen made entry of a certain described tract of public land, as alleged in complainants' bill in equity, and deny that he, the said Soren Hansen, did thereafter convey the same to the defendant, William F. Kettenbach, subject to a mortgage previously by the said Soren Hansen made to the defendant Curtis Thatcher, which mortgage appears on the land records of Nez Perces County wherein the said land is situated, and that the same has not been released. (R., 4447, 4448.)

* * * *but denies* that the land or the title thereto has been conveyed as aforesaid by the said Soren Hansen to the said William F. Kettenbach and deny that the said land was ever by the said Soren Hansen conveyed to the defendant William F. Kettenbach, deny that the defendant William F. Kettenbach has any interest therein, and deny that the said land was entered by the said Soren Hansen in the, or any, unlawful, corrupt, or fraudulent manner, as alleged in complainant's bill in equity, or in respect of all of the lands set out in said bill or in furtherance of the conspiracy charged in complainant's bill in equity, or the title to the said land thus entered by the said Soren Hansen is invalid, obtained in fraud of the law, or voidable at the suit of the United States, but admit that the said various transferees had notice and knowledge of the issuance of the patents to said lands. (R., 4449.)

This answer is signed by petitioners William F. Kettenbach, Kester, and Dwyer and was filed April

15, 1910. (R., 4480.) The deed to Kettenbach is dated March 5, 1909, and acknowledged May 15, 1909, but has not been recorded. (R., 516, 523.) Before executing this deed, however, Hansen executed a deed to the Clearwater Timber Company for the claim. (R., 524.)

The record title to this claim is in the Clearwater Timber Company. Kettenbach endeavored to sell the claim to the Clearwater Timber Company and had a deed executed by Hansen to the company. The deed was recorded while the notice of *lis pendens* was of record and the company admits that it did not pay any consideration for the deed; that it has not paid taxes on the claim and does not own nor has it ever owned or claimed title to said entry or any interest therein; and the record further shows that the company has quitclaimed the entry to Kettenbach but that the deed therefor is withheld from the record. This phase of the entry is discussed at pages 323, 324, 325, Government's original brief.

At the date of execution of the deed from Hansen to Kettenbach the original bill in these cases was pending and the Hansen entry was attacked therein, and notice of *lis pendens* was of record, and Kettenbach was a party to said suit and had been served with process. (R., 18.) It is manifest from reading the testimony in connection with this entry that Kettenbach deliberated misstated the facts in regard to this entry in his answer filed in these cases and had it not been for certain facts developed in the testimony of Hansen and Nathaniel Brown, the agent of

the Clearwater Timber Company, it is doubtful whether the deed from the Clearwater Timber Company to Kettenbach then in the possession of one of counsel of record in these cases and had been held by him for some time, would have been produced or ever heard of, and that Kettenbach would have endeavored to maintain at the trial that he did not then nor at any other time have any interest in said claim, as stated in his answer. Kettenbach testified that the agent of the Clearwater Timber Company presented him with a deed in which said company was grantee to have Hansen execute and that the same was executed by Hansen, and that subsequently he prepared a deed for the claim in which Hansen was grantor and Kettenbach was the grantee for Hansen to execute (R., 1393); and at the time of the execution of the deed by Hansen to the Clearwater Timber Company, Kettenbach had bought and paid for the claim and that he has paid taxes on the same ever since and that the claim is his. (R., 1694.)

Both Kettenbach and the Clearwater Timber Company are parties to the case in which the Hansen claim is involved. The evidence shows that the former has no interest in the claim and that Kettenbach has title to the same.

Appellees urge that there is no evidence as stated in the Government's original brief (p. 56) to sell the Hansen claim to the Clearwater Timber Company (Babb's B., 42). Robnett testified to the arrangement. (R., 2318.)

IDAHO TRUST COMPANY.

Under this heading in our original brief, pages 305 to 316, we have shown Frank W. Kettenbach's relations to petitioners Kester, Kettenbach, and Dwyer and his connection with the Idaho Trust Company; and that he negotiated the transfer of the title to the claims from Kester, Kettenbach, and Dwyer to said company and have made it clear that he had knowledge of the conditions under which said entries were made and perfected, or, at least sufficient notice to put him upon inquiry, and that therefore the Idaho Trust Company, which he represented, can not be held to be an innocent purchaser.

Complaint is made—

that the Government has offered in evidence an anonymous campaign circular circulated in a political campaign in 1904 (vol. 11, pp. 4020 to 4026) in which this litigation had its origin, also newspaper publications in support of the same propaganda (vol. 11, p. 4627) and an affidavit of Frank W. Kettenbach (vol. 11, pp. 4042 to 4060) (Babb's B. 21).

The objectionable campaign circular and newspaper publications were attached to an affidavit of Frank W. Kettenbach and filed in the United States District Court of Idaho by him in support of a motion for a change of place of trial of a case in which he was indicted for violating the national-bank act, his contention being that by reason of the wide circulation of these publications in the northern division of the District of Idaho where he lived and wherein

the timberlands in suit are situated such widespread prejudice had been created against him because of the charges that he had been connected with Kester and Kettenbach in their fraudulent land schemes as far back as 1904, that it would be impossible to secure a jury in that community that would give him a fair trial. The said criminal cases against him were consequently transferred to the central division of the district for trial. These papers were introduced in the present cases for the purpose of showing that according to Frank W. Kettenbach's own sworn statements practically everybody in the northern part of the State were given notice of Kester and Kettembach's fraudulent land transactions and that therefore he could not claim that he was not put upon inquiry. (R., 4052, 4053, 4059, 4020 to 4030.)

CLEARWATER TIMBER COMPANY.

In addition to what we have said in our original brief under this head, pages 317 to 326, to the effect that the Clearwater Timber Company took and now holds the title to a number of entries involved in the present cases knowing the entries to be invalid and voidable by the United States, the record shows that N. B. Brown, who negotiated for the entries attacked, was the purchasing agent in Idaho for the Clearwater Timber Company and had been so for 8 years and purchased timber lands for said company. (R., 1639.)

There were no officers of the Clearwater Timber Co. residing in Idaho, and Brown was the only agent it had in the State. F. J. Davies, of Spokane, Wash-

ington, testified that he never made any purchases in Idaho of timberland for said company but that he honored Brown's drafts for the purchases made by him of timberlands and closed the purchases; and that the purchase of timberlands in Idaho was left exclusively to Brown's judgment, and that Brown was the only person in Idaho that was purchasing timber for the Clearwater Timber Company at the time of the purchase of the claims mentioned. (R. 3615 to 3623.) The argument of counsel for appellee, the Clearwater Timber Company, is inconsistent in that in regard to the Benton, Washburn, and other entries he contends that Brown was not aware of the chain of title nor did he look at or examine the abstract of said claims, while in regard to the purchase of the Hansen claim he was much concerned as to the validity of the title. (Babb's B., 36, 42.) It is to be borne in mind that all of these claims were purchased by Brown for the Clearwater Timber Company shortly after the conviction of Dwyer and Robnett on the charge of subornation of perjury in connection with their land transactions; and Kester, Kettenbach and Dwyer had been convicted of conspiracy to defraud the Government of a number of timber claims, at which trial Brown had appeared as a witness.

**OPPORTUNITY OF TRIAL COURT TO SEE AND HEAR THE
WITNESSES.**

It is contended that unusual weight should be given to the finding of facts by the lower court, as the judge

who tried the present cases had the opportunity of hearing the witnesses testify and of observing their demeanor on the stand and of knowing the facts and the circumstances surrounding the witnesses in the giving of their testimony. (Tannahill's orig. B. 230, and Babb's B. 16.)

The testimony in these cases was taken before an examiner and not before the district judge in open court. As stated in our original brief some of the witnesses in the present cases testified in a criminal case against three of the appellees wherein it was charged that a number of the entries involved in the present cases were unlawfully entered in furtherance of a criminal conspiracy. The trial court alludes to that matter in its opinion. It would seem, however, that no greater weight should be given to the observations of the court in these particular cases than in the case where a judge in any other equity proceeding states in his opinion that he had been aided in reaching his conclusion by his acquaintance with some of the witnesses or that he had seen and heard them testify at a criminal trial. As a matter of fact, a comparatively small number of the witnesses appeared before the lower court in any of the trials referred to and the court held that the claims of a number of those witnesses were entered in fraud of the statute, and as to a number of others, such as Carey, Ed. M. and H. F. Lewis, Lambdin, and Shaffer, who testified at former trials, no mention is made either of them or of their entries. The following are some of the witnesses and

entrymen in the present cases who have not appeared before the lower court in any of the cases:

Steffey and the eight entrymen forming his group, Maris, Washburn, Robertson, Nelson, Hansen, Little, Harrington, Pierce, Bashor, John H. Long, George Morrison, Hyde, Clute, Evans, Bishop, Newman, Dent, Smith, Dammarell, Bingham, E. P. Kester, Elizabeth Kettenbach, Elizabeth White, William J. White, Mamie P. White, Hallett, Greenburg, McMillian, Rowland, and Gammon.

Appellees cite *Vanderbilt v. Bishop*, 199 Fed., 420, recently decided by this court in support of their contention that under the circumstances the finding of the lower court on the facts should not be interfered with by this court. The case cited is not in point as in that case the judge of the lower court presided at the trial, saw all of the witnesses, and heard all of them testify to all of the facts in issue.

RES ADJUDICATA.

It is contended by appellees that, in view of the fact that they were acquitted in a criminal case wherein they were charged with acquiring some of the timberlands in suit in furtherance of a conspiracy to defraud the United States, the verdict of the jury was in effect a finding that the entries were valid and that the finding in the criminal case should be controlling in this court as to the entries that were alleged in the criminal case to have been unlawfully made. This question was raised by appellees by the pleadings of the lower court. The court held that

that defense was insufficient in law, following the decision of the Supreme Court in *Stone v. United States* (167 U. S., 178, 184).

MISLEADING STATEMENTS.

(a) Appellees quote from the testimony of the witness Cornell as follows (Tannahill's orig. B., 136):

Q. If there was anything you could say that would help them (Kester and Kettenbach) to lose their land you would be willing to say it, wouldn't you?

A. I certainly would; yes. * * *

They failed to quote, however, the testimony of the witness which followed immediately:

Q. Mr. Cornell, would you say anything untrue that would cause them to lose their land?

A. No; nothing but the facts. (R., 2860.)

(b) In Tannahill's original brief, page 141, appears the following:

We are unable to set forth here the entire evidence of Harvey J. Steffey, but inasmuch as the trial court *observed the evidence of Harvey J. Steffey when he testified against the defendants in the criminal case and upon various other occasions, etc.* * * *

Steffey did not testify at any of the trials of petitioners in any criminal case at which Judge Dietrich presided. He did testify on behalf of the Government in the Bank case but Judge Bean presided at that trial.

O'KEEFE GROUP OF ENTRIES.

As to the entries forming this group the lower court held that if the same had been fraudulently entered Kester and Kettenbach would be chargeable with notice by reason of the relations that existed between them and O'Keefe. A discussion of these entries appears at pages 133 to 160, 178 to 187, 237, Government's brief.

It is to be borne in mind that Kester and Kettenbach withheld the deeds to these claims from the record for one and one-half years after they were made and as was said by this court in *Linn-Lane Timber Company v. United States*, 196 Fed., 597 "the fact that a deed is withheld from record or is otherwise concealed is a badge of fraud."

We feel confident that the court will hold that the entries forming this group were made in fraud of the statute, and that Kester and Kettenbach acquired title to the same with notice of the fraud and are not innocent purchasers.

HANSEN ENTRY.

The facts concerning this claim are set out at pages 57 to 60 of the Government's original brief and clearly show that the same was fraudulently entered. The bill of complaint charges that the Hansen entry was conveyed to appellee Kettenbach subject to a mortgage given to Curtis Thatcher, but that said deed to Kettenbach has not been recorded, and that the entry was unlawfully made, and in furtherance of

the conspiracy therein charged. (R., 4278, 4279.)
In his answer petitioner Kettenbach admits—

that the said Soren Hansen made entry of a certain described tract of public land, as alleged in complainants' bill in equity, and deny that he, the said Soren Hansen, did thereafter convey the same to the defendant, William F. Kettenbach, subject to a mortgage previously by the said Soren Hansen made to the defendant Curtis Thatcher, which mortgage appears on the land records of Nez Perces County wherein the said land is situated, and that the same has not been released. (R., 4447, 4448.)

* * * *but denies* that the land or the title thereto has been conveyed as aforesaid by the said Soren Hansen to the said William F. Kettenbach and deny that the said land was ever by the said Soren Hansen conveyed to the defendant William F. Kettenbach, deny that the defendant William F. Kettenbach has any interest therein, and deny that the said land was entered by the said Soren Hansen in the, or any, unlawful, corrupt, or fraudulent manner, as alleged in complainant's bill in equity, or in respect of all of the lands set out in said bill or in furtherance of the conspiracy charged in complainant's bill in equity, or the title to the said land thus entered by the said Soren Hansen is invalid, obtained in fraud of the law, or voidable at the suit of the United States, but admit that the said various transferees had notice and knowledge of the issuance of the patents to said lands. (R., 4449.)

This answer is signed by petitioners William F. Kettenbach, Kester, and Dwyer and was filed April

(c) It is contended by appellees that the testimony of John P. Roos, a Government witness, was outlined by a former assistant United States attorney, and that he testified as prompted by that official, and quotations from the testimony are set out in an effort to support it. (Tannahill's orig. B., 174 to 177.)

The record shows the true facts to be that Mr. Roos, when called upon to tell of his transactions with Kester, was not inclined to give any information on the subject and endeavored to shield Kester. The Government officer being advised of some of the details of the transaction related them to Roos, who then decided to tell all he knew about the matter.

(d) Appellees claim that it is indirectly charged in the Government's brief that the entrymen were indigent, and it is then urged that this statement is without foundation. (Tannahill's B., 3 to 20.)

We are unable to find in our original brief any general reference to the financial condition of the entrymen. We mentioned the fact that Cornell was indigent (Gov. orig. B., 121) and that 4 or 5 of the O'Keefe entrymen were impecunious persons (Gov. orig. B., 156), and the record sustains both of these assertions. We did not go into the financial condition of the entrymen further than to show how, by whom, and at what salary a number of them were employed, and that with few exceptions none of them had sufficient money to initiate his entry or to purchase the land. In support of the question

raised by themselves as to whether or not the entrymen were indigent, it is stated that Fred W. Newman was running a warehouse for Frank W. Kettenbach and received a salary of \$75.00 per month, and owned a house (Tannahill's Sup. B., 10); that Perkins owned a farm and sold timber and cattle and thereby obtained the money with which to make proof and at that time he had more than \$400 in cash (Tannahill's Sup. B., 12); and that the money with which Entryman Nelson made proof was handed to him by Miller (Tannahill's Sup. B., 14). The record shows that at the time of proof Newman was the janitor of the Idaho Trust Company, and that he received the money to make his proof from one Colby, who handed him a bunch of money in the hallway of the land office and told him to pay what it would cost and if anything was left to give it to Fred Emory (R., 687 to 689); that Steffey gave Perkins \$400 with which to make proof, and Perkins testified that at the land office he had Steffey's \$400 in one pocket and his own money in another pocket and that he made the proof with his own money and that he did not return Steffey's (R., 825 to 829); and that Nelson went to the Lewiston National Bank with Miller to get the money from Robnett with which to purchase the land, and Nelson testified that he was satisfied that Miller had his hand on the money (R., 1041 to 1048; Gov. orig. B., 55).

(e) The Clute entry was the only one of the Robnett group incorporated in the bill of complaint in case No. 2210 by amendment (R., 4499), and not the entire group of entries as is stated at page 239 of the Government's original brief.

Respectfully submitted.

PEYTON GORDON,

Special Assistant to the Attorney General,

Solicitor for Appellant.

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant, No. 2209

vs.

William F. Kettenbach, George H. Kester,
Clarence W. Robnett, William Dwyer, and
Frank W. Kettenbach, Appellees.

THE UNITED STATES OF AMERICA,
Appellant, No. 2210

vs.

William F. Kettenbach, George H. Kester,
Clarence W. Robnett, William Dwyer, The
Idaho Trust Company, a Corporation, The
Lewiston National Bank, a Corporation,
The Clearwater Timber Company, a Cor-
poration, Elizabeth W. Thatcher, Curtis
Thatcher, Elizabeth White, Edna P. Kes-
ter, Elizabeth Kettenbach, Martha E. Hal-
lett, and Kitty E. Dwyer, Appellees.

THE UNITED STATES OF AMERICA,
Appellant, No. 2211

vs.

William F. Kettenbach, George H. Kester,
and William Dwyer, Appellees.

Supplemental brief for Frank W. Kettenbach, Appellee
in No. 2209, and for Clearwater Timber Company, Idaho
Trust Company, and Lewiston National Bank and Pot-
latch Lumber Company, Appellees in No. 2210.

JAMES E. BABB,
Lewiston, Idaho,
Solicitor for said Appellees.
PEYTON GORDON,
Solicitor for Appellant.

Appeals from the District Court of the United States
for the District of Idaho, Central Division.

FILED

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UNITED STATES CIRCUIT COURT OF APPEALS

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THE UNITED STATES OF AMERICA,
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vs.

William F. Kettenbach, George H. Kester,
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THE UNITED STATES OF AMERICA,
Appellant,

No. 2210

vs.

William F. Kettenbach, George H. Kester,
Clarence W. Robnett, William Dwyer, The
Idaho Trust Company, a Corporation, The
Lewiston National Bank, a Corporation,
The Clearwater Timber Company, a Cor-
poration, Elizabeth W. Thatcher, Curtis
Thatcher, Elizabeth White, Edna P. Kes-
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THE UNITED STATES OF AMERICA,
Appellant,

No. 2211

vs.

William F. Kettenbach, George H. Kester,
and William Dwyer, Appellees.

Supplemental brief of James E. Babb, Solicitor for
Clearwater Timber Company, Idaho Trust Company,
Lewiston National Bank, Frank W. Kettenbach and Pot-
latch Lumber Company, Appellees.

Appeals from the District Court of the United States
for the District of Idaho, Central Division.

The court may remember that on the oral argument we
called attention to the absence of anything in the opening

oral argument on behalf of appellant, touching any of the appellees represented by the solicitor presenting this brief, and that we stated that we would therefore make no reference thereto and that we did not do so. Leave was given all appellees to submit additional briefs on account of appellant's delay in serving appellant's brief, and an additional brief was submitted by other appellees only, to which appellant has filed a brief, designated a "reply," but which opens up again upon the appellees represented in this brief, and in addition proceeds to make new points not before made. This "reply" brief came in just as writer hereof was leaving for Washington, D. C., where he has been daily engaged since, and is still engaged, and where must now prepare this rather than wait till return to Idaho. A copy hereof will be served and we respectfully solicit the court's attention to the following:

I.

The author of this brief is not aware of what affidavits of improper conduct of Government representatives are in this case referred to on page 3 of said reply brief, but disagrees with the suggestion that all evidence bearing upon intimidation of witnesses and contradictory statements of witnesses be ignored, because such conditions have been shown previously. Each additional time such showing is made, strengthens the demand that it be noticed, and in this case, above all others—one in equity where the proof must be so clear and satisfactory—a case where coercion and contradictory statements, and testimony delivered by a large embezzler with hope of immunity, receiving a pardon therefor. No person can doubt that the pardon was fully understood to be a condition of the testimony given in this case—something permissible in a criminal case, but

not in a civil case. Of this pardon the Governor of Idaho, Hon. James H. Hawley, in a proclamation addressed "To the People of Idaho," and published in the daily papers of November 15, 1911, said: "No act ever done in connection with the courts of Idaho has so brought justice into disrepute."

Note also the opinion of Attorney-General Wickersham of May 10, 1912, concerning the pardon of Jones, of Oregon, and the practices of United States prosecutors there disclosed, and does it not appear that the request that all such evidence be simply ignored (always improper), is especially inopportune, and is it not only by a certainty, that the ear of the court is not deaf thereto that such practiced will end, and evidence thereof cease to come forward?

II.

Speculation.

The point that the prohibition of purpose to take the land "for sale" in the bill discussed in the discussion set forth in appellant's first brief was omitted from the bill later introduced and passed rather than stricken by amendment from the original bill, after that discussion is not important, since in each case it is true that the discussion quoted pertained to a bill containing the prohibition, and not to the bill passed, which omitted it.

The shifting of appellant's position could only be established by the briefs below which are not in the record. The brief of the same counsel in this court in the Barber Lumber Company case, 172 Fed., 948, will show how he formerly presented a similar case.

III.

Antecedent Agreements.

U. S. *vs.* Betts, 192 Fed., 708, cited, was not similar to this case. There was no uncertainty in the evidence. No improvements at all were made on the homestead claims and claimants were only on the claims two or three times not to exceed a "few hours" and "defendant was the only person vitally interested in procuring the titles," he having a large sheep range he was protecting from encroachment. Nor is U. S. *vs.* Smith, 181, Fed., 545, cited similar. There the defendant "*caused* . . . the applicants to be advised . . . they would receive . . . the stipulated sum . . . and they acted on such understanding in making the application, and subsequently conveying the property."

IV.

Hanson Entry.

While These Appellees are not Interested in This Particular Entry, it is not to Their Interest That a Serious Error as to Any of Them Stand Uncorrected.

On page 26 of appellant's brief is a reference to the Hanson entry. We would not consider it worthy of notice, were it not for the fact that an effort is made to show a variance between the answer of the appellees and the evidence, and for the reason that counsel has not given to the court all of the facts in relation to this entry, especially the occurrences subsequent to the filing of the answer. The answer was filed on April 15, 1910 (page 4480 of the record), and on pages 4447, 4448, and 4449, is the answer

in relation to the Soren Hanson claim. On pages 4447-4448, in relation to this claim, the defendants state:

“ . . . admit that the said Soren Hanson made entry of a certain described tract of public land, as alleged in complainant's bill in equity, and deny that he, the said Soren Hanson, did thereafter convey the same to the defendant, William F. Kettenbach, subject to a mortgage previously by the said Soren Hanson made to the defendant Curtis Thatcher, which mortgage appears on the land records of Nez Perce County, wherein the said land is situate, and that the same has not been released.”

At page 523 of the record the witness Hanson testifies:

“Mr. GORDON: Q. Now, the third deed that you identified, dated March 5, 1909, running to William F. Kettenbach, what was the circumstance of your executing that deed?

A. Why, that is after—I didn't send that other deed down to Robnett. I went down myself, and me and my wife to Lewiston, so I just took it in and handed it to him and he said—well I don't remember what his explanation was, but anyway he wanted another deed instead of the one I made out for Thatcher; he wanted another one, and so he had another deed there, and he sent a notary public up to my wife's; she was up to her mother's house, and had her acknowledge that other deed, and I kept the first deed to Thatcher.

Q. Now, do you remember to whom that deed ran?

A. The second deed?

Q. The one you have just referred to.

A. Yes, that was to the Clearwater Timber Company.

Q. When was that? After you had executed the other three deeds?

A. The other two, the deed in blank and the deed to Thatcher.

Q. And you executed another deed before you did this one to Mr. Kettenbach, is that right?

A. Yes, sir, to the Clearwater Timber Company.

Q. And was that the one you say that you executed down here at Lewiston?

A. Yes, sir.

Q. And you say Mr. Robnett attended to that for you?

A. Yes, sir.

Q. And then he sent this deed to William F. Kettenbach to you, as I understand?

A. Yes, he wrote to me afterwards again and told me there was a—I forget now whether it was a mistake—but anyway he wanted another deed.

Q. And that was the one? He sent this one to Kettenbach up to you?

A. Yes, he sent that up to me."

So it appears that this deed referred to was never delivered to Mr. Kettenbach; that it was executed by Hanson, at the request of Robnett, and was subsequently by Robnett returned to Hanson, and it was never delivered to Kettenbach. This evidence is not in conflict with the facts, but the brief of counsel would cause the belief that Kettenbach received the deed from Hanson, then denied that it was ever received by him. This statement is unfair, and should not have been made. With this argument, the court should have all the facts.

Counsel also contends that the witness Kettenbach denied that he had any interest in the land, and admitted on the stand that he had. This portion of the denial is referred to at page 4449 of the record, wherein Kettenbach, in his answer, states; after denying any unlawful combination, conspiracy, design, or purpose, the answer states:

" . . . or the land or the title thereto, alleged in complainants' bill in equity to have been conveyed as aforesaid by the said Soren Hanson to the said

William F. Kettenbach, and deny that the said land was ever by the said Soren Hanson conveyed to the defendant William F. Kettenbach; deny that the defendant William F. Kettenbach has any interest therein, and deny that the said land was entered by the said Soren Hanson in the, or any, unlawful, corrupt, or fraudulent manner, as alleged in complainant's bill in equity, or in respect of all of the lands set out in said bill, or in furtherance of the conspiracy charged in complainant's bill in equity, or the title to the said land thus entered by the said Soren Hanson is invalid, obtained in fraud of the law, or voidable at the suit of the United States, but admit that the said various transferees had notice and knowledge of the issuance of patents to the said lands."

We have heretofore observed that the answer was filed on April 15, 1910. Mr. Kettenbach states that he was only acting as agent, or as a vendor as he stated, and claimed no interest in the land at the time the answer was filed. At pages 1691-1692 the witness testifies:

"A. Well, as I was going along with the abstract, I had ordered the abstract made up, and after I had paid the mortgage, and paid Robnett to pay Hanson I got the abstract, and then I found that there was a lis pendens on the claim, which was a surprise to me. I didn't know anything about that. I figured that the only suits there were were on our own lands, and I ran on to this lis pendens. And in the meantime, Brown had given me a deed, drawn up—they have a separate form of deed, different from anybody else—and he had given me one of their deeds to have him execute, and this deed was executed, and if they was paying all the money and everything the claim was to go to Brown. Of course, I was acting in the position of a vendor, you might say, but I was paying out my own money and doing all this, and when it was turned over to Brown I was to get my

money back. Well, as I say, as soon as I got the abstract I noticed this lis pendens, and I went to Brown and I told him, I says, 'Brown, here is a lis pendens; I didn't know it until I got the abstract.' He says, 'the claim has never belonged to us, and it must be a mistake that they are suing on that claim,' and I says, 'couldn't you take it to your attorney, and find out?' and he did that; and then, of course, he couldn't take it.

Q. Then you asked for a deed to yourself?

A. Then I asked for a deed to myself.

Q. And you prepared the deed?

A. I prepared the deed, and gave it to Mr. Robnett.

Q. And that is the deed that was offered here in evidence, wasn't it?

A. Well, I didn't know it had been offered in evidence. But the condition was this: It was just about that time, Mr. Gordon, where things got to that stage where this bank trouble came up, the first exposure of the thing, and I had my money tied up in it, and I felt that Robnett was naturally not interested in me any more, or in us, and it seemed apparently he had not been for quite a while, and I was there with my money out, and nothing to show for it. There was no reason why Robnett could not have gone to Hanson and got a deed to myself, so I took the matter in my own hands, and on my own volition I took the deed I had used, conveying the land to the Clearwater Timber Company, and put that on record, feeling that I could go to them and that they would quitclaim back to me, and in that way I could protect myself, and that is the reason I did that."

It thus appears that Mr. Kettenbach had asked for a deed to himself, and had drawn it up, and had it sent to Hanson for execution, and it was never delivered to Kettenbach, and it was by Robnett returned to Hanson. This must have been very late in the proceedings, and it does not

appear from the record just what date this occurred, but the record shows that the deed from the Clearwater Timber Company to Kettenbach bears date July 27, 1910, but this deed was never delivered, and Kettenbach did not know that it was executed until it was brought out in evidence during the trial. It is clear, however, that Kettenbach never claimed any interest in the land whatever until after the answer was filed, and until it developed that the lis pendens covered this particular tract of land as well as other lands, and that it could not be purchased by the Clearwater Timber Company, and that Kettenbach could not obtain the delivery of the deed from Hanson to himself, and he simply put the deed to the Clearwater Timber Company on record as a matter of protection, as he had advanced the money to pay the mortgage to Curtis Thatcher and also to pay to Hanson. He simply held the same (without arrangement therefor) as a matter of security, and he has not as yet in reality obtained title to the land. It still stands of record, in the name of the Clearwater Timber Company, without consent of the timber company; but in view of the fact that these matters all occurred subsequent to the filing of the answer, and that Mr. Kettenbach went upon the stand and gave a full and complete history of the entire transaction, concealed nothing, evinces his good faith, and that he did not in any way or manner attempt to state in his answer anything contrary to the facts. A careful examination of the entire matter discloses that the answer is not in conflict with the facts as they existed at the time of the filing of the bill in equity and at the time of preparing the answer. As a matter of fact it does not appear from the record just how long the answer was signed before it was filed. Justice to the defendants requires consideration of the forging.

Opportunity of Court Below to See and Hear the Witnesses.

On page 34 of counsel's brief is a reference to certain witnesses who did not appear and testify in the criminal actions against the defendants, Kester, Kettenbach, and Dwyer, involving the land in question. While it may be true that these witnesses did not appear and testify in these criminal actions, yet their evidence has but little weight in determining the questions at issue. The most important witnesses appeared in the criminal trials, and compared with the number not appearing, those not appearing would be small. The witnesses, Washburn, Hattie Rowland, Pierce, Hyde, Evans, Bishop, Dent, and Smith, did not appear in these cases, and when you consider the fact that the witnesses, Alexander, Atkinson, Bartlett, Joel R. Benton, Brown, Carey, Chandler, Chapman, Clausen, Comerford, Cornell, Dowd, Dreckman, Mrs. Kittie E. Dwyer, Ferris, Flood, Fralick, Gammon, Gatch, Goodwin, Gregory, Haevernick, Hutchins, Jackson, Jenson, Kester, William F. Kettenbach, Lafferty, Lambdin, Hiram F. Lewis, Edward M. Lewis, George W. Lewis, Molloy, F. D. Morrison, Peffley, Parker, Robnett, Roos, Shaeffer, Sherburne, Edward C. Smith, Charles W. Taylor, Edgar J. Taylor, Paul H. Waldman, Robert O. Waldman, Walter Williams, Ella Wilson, Guy L. Wilson, William B. Benton, J. M. Bradbury, C. W. Colby, William Dwyer, Fred W. Emery, Martin L. Goldsmith, Masters, Schultz, Thatcher, and West, testified at the previous criminal trials, it makes the number of witnesses who did not testify at the previous trials, appearing on page 34 of appellant's brief, appear infinitely small.

Counsel's contention that by reason of the court having examined the evidence only, no weight should be given the

appellees' contention that the court, having observed the witnesses' manner of testifying upon previous occasions, should have as much weight as though the court heard the evidence in this cause. In view of the fact that the additional witnesses used in the present case are so few, and their evidence of so little importance, we believe that if the court will turn to the evidence of these various witnesses it will arrive at the conclusion that the evidence of these witnesses strengthens the appellees' case instead of weakening it or aiding the appellant. The evidence of Mrs. Maris shows conclusively that the appellees had nothing at all to do with the entry until long after final proof was made. The evidence of Robinson and Nelson supports appellees' contention. The evidence of Hanson we have heretofore referred to. The evidence of Little, Harrington, Pierce, Bashor, and Long strengthens the case of the appellees. The witness, George Morrison, did not appear and testify in this case. The witness Hyde did not appear and testify. The witness Evans was dead at the time of the trial and did not testify in either case. The evidence of Bishop does not strengthen the appellant's case. The evidence of Newmann, Dent, Smith, Dammorell, Bingham, Edna P. Kester, Elizabeth Kettenbach, Elizabeth White, William J. White, Mamie P. White, Martha E. Hallett, Daniel W. Greenburg, William McMillan, and Drury M. Gammon does not strengthen the appellant's case. The witness, Hattie Rowland, did not appear and testify. Therefore, out of the few witnesses referred to on page 34 of appellant's brief, as having testified in this case, who did not testify in the criminal cases tried before Judge Dietrich, the witnesses, Washburn, Pierce, Hyde, Evans, Bishop, Dent, Smith, and Rowland, did not testify in this cause at all, and counsel is in error wherein he states they did testify in this case.

VI.

Idaho Trust Company.

The motion for change of venue referred to at pages 30-31 Reply Brief, was based on public rumors which would cause *suspicion* and bias, yet neither rumors nor could *suspicion* only prevent one from being a bona fide purchaser (Babb's Brief, pp. 56-63). The fact that Frank W. Kettenbach testified to some fact of narrow compass in one of the land fraud trials, certainly charges him with no notice concerning any entries not involved in that case, nor can it be presumed from the mere fact that a person testifies to some fact in a case that he knew all about the case, and the other facts therein.

VII.

Clearwater Timber Company.

The date of patent to Joel H. Benton, given page 27 of our brief as February 25, 1905, should have been the same date in 1904, and in the claim of title of the W. B. Benton claim, page 24 of our brief, should have appeared the mortgage from Robnett to Guernsey for \$3,000, and the release thereof.

Look at the chain of titles, pages 24-30 of our brief, and see what there is to put us on inquiry, when all the facts are considered, pages 33-45 our original brief.

There is nothing to show that Brown or any person but Davies in Spokane saw the chain of title in any of the cases that made any progress toward a contract.

As to the Hanson and other claims, *after all the deals on all titles bought were closed*, Brown learned from the newspaper or Kettenbach that a lis pendens was pending, before negotiation had progressed to a bargain or the securing of an ab-

stract of title, and was advised that with a lis pendens pending it would be futile to go further—this after all deals were closed for the titles bought and therefore can have no bearing thereon.

Respectfully submitted.

JAMES E. BABB,
(P. O. Lewiston, Idaho)

Solicitor for Idaho Trust Company, Lewiston National Bank, Frank W. Kettenbach, Clearwater Trust Company, Potlatch Lumber Company, Appellees.

UNITED STATES OF AMERICA, {
District of Columbia, {
City of Washington, }

James E. Babb being first duly sworn on oath says that he sealed a full true and correct copy of foregoing brief in an envelope and legibly addressed the same thus, "Peyton Gordon, care of Department of Justice of United States, Washington, D. C., and stamped thereon sufficient United States postage stamps to entitle it to delivery by United States Mail, and deposited the same on the 28th day of May, 1913, in United States Post-Office, in said city of Washington, said address being then correct, and said Gordon then having an office in said Department of Justice.

Subscribed and sworn to before me, this 28th day of May, 1913.

James E. Babb
Frank W. Kettenbach
Notary Public.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA.

Appellant,

No. 2209

vs.

William F. Kettenbach, George H. Kester,
Clarence W. Rolnett, William Dwyer, and
Frank W. Kettenbach, Appellees.

THE UNITED STATES OF AMERICA,

Appellant,

No. 2210

vs.

William F. Kettenbach, George H. Kester,
Clarence W. Robnett, William Dwyer, The
Idaho Trust Company, a Corporation, The
Lewiston National Bank, a Corporation, The
Clearwater Timber Company, a Corporation.
Elizabeth W. Thatcher, Curtis Thatcher, Eliza-
beth White, Edna P. Kester, Elizabeth Ketten-
bach, Martha E. Hallett, and Kitty E. Dwyer,
Appellees.

THE UNITED STATES OF AMERICA,

Appellant,

No. 2211

vs.

William F. Kettenbach, George H. Kester, and
William Dwyer, Appellees.

Copies of Pardons Granted July 14, 1913, of Kettenbach and
Kester, absolute and unconditional, before imprisonment,
presented because of references in Govt. Brief pp. 15 and
18 and elsewhere and reply Brief, pp. 1-3.

GEORGE W. TANNAHILL,

Lewiston, Idaho,
Solicitor for Appellees.

PEYTON GORDON,

Solicitor for Appellant.

FILED

AUG 4 - 1913

Appeals from the District Court of the United States for the
District of Idaho, Central Division.

Nos. 2209, 2210, and 2211.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Lewiston, Idaho,

Solicitor for Appellees.

PEYTON GORDON,

Solicitor for Appellant.

Appeals from the District Court of the United States for the
District of Idaho, Central Division.

Woodrow Wilson

President of the United States of America

To all to whom these presents shall come, Greeting:

Whereas,

William F. Kettenbach was convicted in the United States District Court for the District of Idaho of aiding and abetting the Cashier of the Lewiston National Bank, of Lewiston, Idaho, in making false entries in reports to the Comptroller of the Currency, and on April fourth, 1911, was sentenced to imprisonment for five years in the United States Penitentiary at Leavenworth, Kansas; and

Whereas the case was taken to the Circuit Court of Appeals, Ninth Circuit, which Court affirmed the judgment of the District Court, and a motion for re-hearing was denied, February twenty-fourth, 1913; and,

Whereas, an application for a writ of certiorari was denied by the Supreme Court, April twenty-first, 1913; and,

Whereas, the issuance of the mittimus has been delayed, pending the result of an application for pardon; and,

Whereas, it has been made to appear to me that the said William F. Kettenbach is a fit object of executive clemency:

Now, therefore, be it known, that I,

Woodrow Wilson, *President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant*

unto the said William F. Kettenbach a full and unconditional pardon.

In testimony whereof I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

Done at the city of Washington this
fourteenth day of July, in the year of our
Lord One Thousand Nine Hundred and
Thirteen, and of the Independence of the
United States the One Hundred and
thirty-eighth.

(SEAL OF DEPT.
JUSTICE.)

Woodrow Wilson

By the President:

J. C. McReynolds,

Attorney General.

Woodrow Wilson

President of the United States of America

To all to whom these presents shall come, Greeting:

Whereas,

George H. Kester, formerly Cashier of the Lewiston National Bank, of Lewiston, Idaho, was convicted in the United States District Court for the District of Idaho of making false entries in reports to the Comptroller of the Currency, and on April fourth, 1911, was sentenced to imprisonment for five years in the United States Penitentiary at Leavenworth, Kansas; and,

Whereas the case was taken to the Circuit Court of Appeals, Ninth Circuit, which Court affirmed the judgment of the District Court, and a motion for re-hearing was denied, February twenty-fourth, 1913; and,

Whereas, an application for a writ of certiorari was denied by the Supreme Court, April twenty-first, 1913; and,

Whereas, the issuance of the mittimus has been delayed, pending the result of an application for pardon; and,

Whereas, it has been made to appear to me that the said George H. Kester is a fit object of executive clemency:

Now, therefore, be it known, that I,

Woodrow Wilson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby

grant unto the said George H. Kester a full and unconditional pardon.

In testimony whereof *I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.*

(SEAL OF DEPT.
JUSTICE.)

Done *at the city of Washington this fourteenth day of July, in the year of our Lord One Thousand Nine Hundred and Thirteen, and of the Independence of the United States the One Hundred and thirty-eighth.*

Woodrow Wilson

By the President:

J. C. McReynolds,

Attorney General.

State of Idaho, }
County of Nez Perce, }ss.

George W. Tannahill being duly sworn on oath says:
That he is solicitor and counsel in above entitled cases; that
the foregoing are true copies of the original Pardons granted
to Wm. F. Kettenbach and George H. Kester, the originals
bearing the signature of the President and Attorney General and
the seal of the Department of Justice.

GEORGE W. TANNAHILL.

Subscribed and sworn to before me this 30th day of July,
1913.

(Notarial Seal)

HENRY S. GRAY,

Notary Public.

AFFIDAVIT OF SERVICE BY MAIL OF COPIES OF
PARDONS GRANTED JULY 14, 1913, OF KET-
TENBACH AND KESTER.

State of Idaho , }
County of Nez Perce. }

George W. Tannahill, being first duly sworn, on oath says that he sealed a full, true and correct copy of foregoing copies of Pardons granted July 14, 1913, of Kettenbach and Kester, in an envelope and legibly addresssed the same thus, "Peyton Gordon, care of Department of Justice of United States, Washington, D. C.," and stamped thereon sufficient United States postage stamps to entitle it to delivery by United States mail, and deposited the same on the 31st day of July, 1913, in United States Postoffice, in the City of Lewiston, Idaho, said Gordon being an attorney of record in the above entitled causes, and said address being the last known address of said Gordon known to affiant.

Affiant further says that he sealed a full, true and correct copy of said annexed and foregoing copies of Pardons granted July 14, 1913, of Kettenbach and Kester, in an envelope and legibly addressed the same thus: "J. C. McReynolds, Attorney General, care of Department of Justice of United States, Washington, D. C." and stamped thereon sufficient United States postage stamps to entitle it to delivery by United States Mail, and deposited the same on the 31st day of July, 1913, in United States Postoffice, in the City of Lewiston, Idaho, said address being then correct and said J. C. McReynolds then being the Attorney General of the United States and by virtue of said office then being Solicitor for the above named Appellant, The United States of America, in said causes, and then having an office in said Department of Justice.

GEORGE W. TANNAHILL,

Subscribed and sworn to before me this 31st day of July, A.
D., 1913.

(Seal)

HENRY S. GRAY,
Notary Public.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,

vs.

Appellant,

CLARENCE W. ROBNETT, WILLIAM DWYER, and FRANK W. KETTENBACH,

Appellees.

No. 2209.

THE UNITED STATES OF AMERICA,

vs.

Appellant.

WILLIAM F. KETTENBACH, GEORGE H. KESTER, CLARENCE W. ROBNETT, WILLIAM DWYER, THE IDAHO TRUST COMPANY, A Corporation, THE LEWISTON NATIONAL BANK, a Corporation, THE CLEARWATER TIMBER COMPANY, a Corporation, ELIZABETH W. THATCHER, CURTIS THATCHER, ELIZABETH WHITE, EDNA. P. KESTER, ELIZABETH KETTENBACH, MARTHA E. HALLETT and KITTY E. DWYER,

Appellees.

No. 2210.

THE UNITED STATES OF AMERICA,

vs.

Appellant,

WILLIAM F. KETTENBACH, GEORGE H. KESTER and WILLIAM DWYER,

Appellees.

No. 2211.

Upon Appeals from the United States District Court for the District of Idaho, Central Division.

PETITION OF APPELLEES, WILLIAM F. KETTENBACH, GEORGE H. KESTER, WILLIAM DWYER, KITTY E. DWYER, THE LEWISTON NATIONAL BANK, A CORPORATION, THE IDAHO TRUST COMPANY, A CORPORATION, AND EACH OF THEM SEVERALLY, FOR A RE-HEARING.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

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No. 2211.

Upon Appeals from the United States District Court for the District of Idaho, Central Division.

PETITION OF APPELLEES, WILLIAM F. KETTENBACH, GEORGE H. KESTER, WILLIAM DWYER, KITTY E. DWYER, THE LEWISTON NATIONAL BANK, A CORPORATION, THE IDAHO TRUST COMPANY, A CORPORATION, AND EACH OF THEM SEVERALLY, FOR A RE-HEARING.

The appellees severally herein petition for a rehearing upon the following grounds:

I

From the bottom of page 11 and the top of page 12, the opinion of the Court relates to the testimony of Clarence W. Robnett, and among other things the Court says:

"It is also true that his testimony is not altogether free from contradictions and misstatements, and were it not for the corroborating testimony of the entrymen, we should reject it altogether."

An examination of the record discloses that the Court held for cancellation certain patents wherein the testimony of the entrymen did not corroborate the evidence of Clarence W. Robnett, but is in direct conflict therewith, and we call the Court's attention to the evidence of Lon E. Bishop, Frederick W. Newman, Charles Dent and William McMillan, appearing on page 23 of the Court's opinion.

We call the Court's attention to the evidence of C. W. Colby appearing at pages 3080 to 3085, of the transcript, and especially page 3082, wherein the witness states:

"A. Well, these entrymen were in the employ, had been for some time in the employ of Small & Emery, except perhaps Mr. Dent, who wasn't particularly employed by them, but had considerable dealings—he kept a house at which

they stopped in going and coming, and also kept some goods, and they got goods from him in going and coming from Lewiston to the timber, and these—there was a good deal of talk about taking to timber and these parties concluded that they wanted some, and Mr. Emery had been engaged in locating parties on timber, had made a business of it, and finally located them on timber.”

(Page 3084). “A. Yes, sir; and asked him (meaning Mr. Kettenbach) for a loan of this money to prove up with, and I think he said he would speak to Mr. Kester about it, and let me know in a short time, or perhaps let me know in the morning; anyway, it was only a short time he took to give me an answer. * * * *

“A. I mean made proof; yes, sir. Excuse me. When they were ready for the money, I got the money from the bank and handed it to them, and they went and made their proof.”

MR. TANNAHILL: Then what happened after they made their proof?

“A. Well, Mr. Kettenbach says: ‘Now,’ he says, ‘I look to you, Mr. Colby, to get those mortgages and see that this thing is all straight,’ and so I waited around until they made their proof, and when they did, I asked them to go up to Mr. Barnett’s office—I went up into Mr. Barnett’s office before this, and told him the boys were making proof and I would like to have them give a mortgage, and told him I would like to have them remain in his office—it was getting late in the evening then—and I wanted him to remain there to fix up these mortgages and he said he would and did. * * * * Emery came up and says: “The boys want to sell instead of giving a mortgage. They say they will have the same trouble about meeting the mortgage they

are having now, and prefer to sell, if they think they can get a reasonable price," and asked me if I thought Mr. Kettenbach would buy it, and I says: 'I think not; it is so soon after proving up, but,' I says, 'I will go and see him.' I went and saw Mr. Kettenbach and he says: 'Have they proved up?' and I says, 'Yes.' 'Have they got their final receipts?' and I says, 'Yes.' 'Well,' he says, 'It is as much theirs now as it will ever be,' and he says, 'Yes. I will buy them if I can get them right,' and he says 'What will they cost?' and I says, 'They will average about \$750 or a little less, some more.' 'Well,' he says, 'I will see Mr. Kester about it and let you know in a little while,' and I saw him again, and he says, 'We will take them if they don't cost more than \$750,' so then I told Mr. Emery that Mr. Kettenbach would buy them, and what he would give, and Mr. Emery seemed to understand by that what the boys wanted for them, and instead of making mortgages they made deeds, (Page 3086 of the record).

(Page 3087). "Q. I will ask you if at the same time, or at any time, you stated to Mr. Kester, or anyone else, what the entrymen were doing, or that they were to go ahead and prove up, and deed the claims over to Colby and Emery, meaning yourself and Emery, for \$200 each."

"A. No, sir; there was nothing of that kind. Nothing suggesting any such thing in the conversation at all."

FRED W. EMERY,

We also call the Court's attention to the evidence of Fred W. Emery, appearing at pages 3115 to 3138 of the record. On page 3117 the witness testifies:

"Q. Now, just state what occurred in relation to the location of these parties on timber claims?

A. Why, these parties were all men, except Dent, that has worked for us for a number of years off and on, for—well, for the past probably 15 years. Evans probably a good deal longer than that, and at this time they were working the biggest part of the time for us in the woods. We were in the lumber business. * * * *

A. And I was doing some locating off and on, as I had time to cruise some timber and parties were anxious to get located, why I would locate a few of them; and I was up in the woods one day, and they were there at one of the homesteader's cabins, in fact, Evans' homestead, and they got talking about timber claims, about me locating people, and wanted to know if there was anything left, and I told them about a bunch of timber there was there; that is, there was about four of them there, I think, at that time; and they wanted to know if I thought it was worth taking, and I told them I thought it was, and they talked the matter over there during the afternoon among them and concluded they wanted to get located, and wanted me to locate them, and I told them I would as soon as I had a little time. The next—I came down early then, and when I came back they were there, and I took them and went over the timber with them and located them.

Q. And what occurred next?

A. Well, they came down to Lewiston and made their filings; and after that a short time they told me that they would have to get money—they would have to borrow money to prove up on these claims. Well, they wanted to know what I thought about it, and I told them I didn't think they would have any trouble in borrowing money; that there was lots of men in the country that was loaning money on timber claims, enough to prove up on, and they told me to look out for somebody that would be apt to have some, as they didn't know as they would have enough, and I told them I would. Well, it run on for some time then, and I spoke to Mr. Colby, as he was our book keeper at that time, and asked him if he knew of anybody that would be liable to loan them boys what money they would need on those claims for proving up, and he said he didn't right then, but he thought probably he could find them, and I told him to look around and see who they was; and some time after that he told me that Mr. Skinner—I think it was W. H. Skinner, that used to be mayor here, whatever his initials was—would loan them the money, but it proved—some short time before they got ready to prove up why Skinner's money didn't get there, and so there was no show to get it of him, and so I told him to see other parties, and he told me he would, and one day he said he was talking with Mr. Kester, I think, in regard to it,—

Q. Mr. Kester or Mr. Kettenbach?

A. I wouldn't be sure whether it was Kester and Kettenbach, or Mr. Kettenbach, but he said they hadn't decided whether they would loan it or not; and a short time after that Mr. Kettenbach, I think it was, called me in and wanted to know what I thought about this timber, if I had located it and cruised it, and if I knew what

there was on it. I told him I did, and he wanted to know if I thought a loan would be safe of \$400.00 on it. I told him I thought it would be perfectly safe; while it wasn't first-class timber, it was second growth, and it would probably cut a couple of million feet to the quarter section, and I considered it safe to loan on it.

Q. Now, what happened next?

A. Well, it appears that he loaned the money on these claims; and after these boys had proved up there was several of them came to me and wanted to know if I didn't think these parties would buy the claims.

Q. Now, did they all prove up at the same time?

A. No; I think there was four proved up that day.

Q. And it was these four that came to you?

A. Yes.

Q. All right. What did you tell them?

A. Well, I told them I didn't know. They said they would rather sell their claims if they could get something reasonable for them instead of giving a mortgage on them, because they were all homesteaders in there, and they could use the money to good advantage to improve their homesteads with.

Q. And then what did you do?

A. Well, I spoke to Mr. Colby about it. I told him the boys would rather sell those claims out and out than to mortgage them, and to see what he could do about it, and I think he went and saw

Messrs. Kester and Kettenbach, and they decided that they would buy the claims, providing they were all right.

Q. And when were they sold?

A. I think they were sold that day.

Q. And do you know anything about the sale of the other two claims?

A. No, I don't know about the arrangements for the sale of the other two claims.

Q. Now, was there any talk of the sale of these claims before they made their final proof?

A. No.

Q. Was there any understanding or agreement between you that they were to take these claims up for you?

A. None whatever.

Q. What location fee did they pay you?

A. They paid me \$100.00.

Q. \$100.00 for each claim?

A. Each claim.

Q. Are you acquainted with Clarence W. Robnett?

A. I am, yes, sir.

Q. How long have you known him?

A. Why, I think about fifteen years.

Q. I will ask you, Mr. Emery, if, the morning after the first conversation with Mr. Colby, between Mr. Colby and Mr. Kettenbach, relative to loaning the money on the claims, that you and Mr. Colby came into the office—William F. Kettenbach's private office—and talked the matter over, and you told Mr. Kester, or Mr. Kettenbach, or either of them, that you had checked these claims over, and you knew they were the best claims in the whole township that was subject to filing, and that Mr. Kester told Mr. Colby that they would go and furnish the money for the proof, and take the claims under the same conditions that you had with the entrymen, to pay them \$200.00 for their right?

WITNESS: No; I never had any such conversation.

MR. TANNAHILL: Just answer the question.

A. Well, the way I understand the question—the way, I mean, that I never had any such

conversation, between Colby and I and Kettenbach, or Colby and I and Kester, because we never met there to talk that over—any matter of that kind.

Q. Did you ever have any conversation wherein you said you were to pay the entrymen \$200.00 for their rights?

A. No, sir.

Q. Now, did you give the names of the entrymen at any conversation between Mr. Kettenbach and Mr. Kester, or Mr. Colby and yourself?

A. No, sir."

On pages 2122 to 2124 the witness testifies that he never had any conversation with Robnett, such as testified to by Robnett; that the evidence of Robnett in relation to all of the conversations concerning these particular tracts of land was and is false.

FREDERICK W. NEWMAN,

The evidence of Frederick W. Newman appears at pages 671 to 694 of the record, direct examination; 695 to 697 cross-examination; 698 to 700 redirect examination.

At page 674 the witness testifies on direct examination:

Q. Who spoke to you about taking up a timber claim?

A. I spoke to Mr. Emery; I asked him in this way: I says, "Mr. Emery, the wood is getting so high, I understand you are locating timber

claims up there; is there any chance at all?" "Well," he says, "there isn't much chance; any claim that is of any account," he says, "is gone:" he says, "it has been taken up long ago." He says, "There might be something there yet. I will see you after a while," or some time or another, "and let you know if there is any land to be had." * * * * *

At page 676 the witness testifies:

A. Why, I says for him to wait a few days. I says, "I want to see E. C. Smith, to see if they are loaning any money on Clarkston real estate." I owned a house and lot in Clarkston, and I says to Mr. Smith, "Are you loaning any money on Clarkston real estate? And he says, he would, but he says, "Why not get it over there?" And I says, "I am working for the people over there, and I would rather get it here."

On page 677 the witness testifies:

A. * * * "Well," he says, "how much do you want?" "Well," I says, "about \$300.00, and possibly \$400.00," I says, "I have some money, but I will let you know how much I want." And then I had no more in regards to getting the money matters — I had no more conversation with Fred Emery till some time before proving up time.

On page 684 the witness testifies:

Q. When did you make your arrangement with Mr. Colby to get the money to make your proof?

A. It was a few days before; I met Mr. Emery, and I says, "Fred"—I told him the circumstances of the bank; the bank wanted to make me a two-year loan, and I says, "I don't know as I will ever want the money that long or not."

"Well," he says, "we don't care to be loaning any money for a year for a small loan like that," he says, "we would like to loan you about \$500 for about two years," and I says, "I don't know as I will want it for two years," and I says to Fred, "Is there any way to get the money to pay for the filing now, instead of going to the bank and borrowing the money for two years?" He says, "I don't know; I'll see."

Q. Now, where was this conversation?

A. That was right here in Lewiston.

K. Whereabouts in Lewiston?

A. I think somewheres on the street. I was working at the time and I met him down town. I says, "I can get the money from the Idaho Trust Company by mortgaging my home," and I asked him then if there wasn't private money besides going to the bank, because they wanted to loan it for two years. * * *

Q. How long was that before final proof?

A. I don't think that was much over two or three days.

Q. And then when did he tell you that he would let you have it, or could get it for you?

A. Well, that was—I don't know whether it was the same afternoon or the next day.

On page 695 the witness testifies on cross-examination as follows:

Q. And you had no contract or agreement to sell it to Mr. Emery?

A. No, sir.

Q. Or to Mr. Colby?

A. No, sir.

Q. Or to Mr. Kester or to Mr. Kettenbach?

A. No, sir.

Q. And you had no contract or agreement to sell it before you made the final proof?

A. No, sir.

Q. Now, when was it you concluded to sell your land in relation to the time you made your final proof?

A. I saw my wife at noon, and I says, "I am going to prove up this afternoon," I says, "will you sign a mortgage so we can get the money from the bank?" And I says, I made arrangements with Emery to get the money and we can prove up on it all right." Well, she considered awhile, and then she says, "No, I won't do it," she says, "I won't sign no mortgage." "Well," I says, "what will I do? I will have to prove up this afternoon. I will have to ask Emery if he can sell it for us." And so after we proved up on it I says, "Fred, is there any chance to sell this land now?" He says, "I don't know." He "says, "I can find out." He says, "There is always something selling; perhaps somebody will buy it." He says, "I will see. Maybe it will take a little time." "Well," I says, will you want a mortgage?" "Well," he says, "no." I asked him—requested him to get the money for a few days, until I decided what to do, whether to mortgage the place or not. And so I went and attended to the furnace, and I says, "Fred, if you can find anybody to buy that you go ahead and sell it, because my woman won't sign a mortgage."

Q. Then, the affidavit which you made as follows: "That I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith * * * * *" was true, was it?

A. Yes, sir.

It affirmatively appears that the evidence of the entryman Frederick W. Newman not only fails to corroborate the evidence of Clarence W. Robnett, but is in direct conflict therewith, and amply supports the evidence of Colby and of Emery.

CHARLES SMITH.

The evidence of Charles Smith appears at pages 2995 to 3021 of the record, and on page 2996, in response to a question as to how he happened to take up the claim, he states :

MR. GORDON: Q. Well, now, what else happened? Did you talk with anybody about that?

A. Why, nobody but Ben and I; and then we spoke to Fred Emery about locating us.

Q. Well, now, what did you have to say to Emery?

A. Well, we asked him if he could locate us on a claim, and he said he thought he could, and so he finally did locate us. * * *

Q. Did he say anything else to you except that he could? Was that all that was said?

A. Why, it was all that was said at that time when we first spoke to him; and then we asked him if he would locate us, and he said he would; and so—Oh, it was going on to probably a month during that time from the first time we spoke about it, and he said he would back us up for to get a claim, and he located us.

Q. Now, How do you mean he would back you up? What do you mean by "backing you up?"

A. Well, we really didn't have money enough of our own; at least, I don't think I had; I don't know what was coming to me at the time. We had been—I was to work there, and we would draw money whenever we wanted it, whether it was coming to us or whether it wasn't.

Q. You were married at that time?

A. No, sir.

On page 2998 the witness testifies:

Q. And who paid your expenses of coming from the Clearwater down to Lewiston?

A. I paid them myself.

Q. Where did you get the money?

A. Well, the money I had that I had drawn—wages.

Q. Did you draw it just before you came?

A. Well, I couldn't say as to that. * * *

A. I couldn't say for certain whether I did or not. I never drew any until I came down here, you know. This was where we always drew our money, in Lewiston.

On page 3005 the witness testifies:

Q. Now, when was it you had the talk about getting the money to make proof?

A. Well, that was some time between the time I filed and proving up, I don't remember the time.

Q. Now, what was said about it?

A. Well, there wasn't any more said than I asked Fred if he would let me have the money, enough to prove up on it, and he said he would if he could, but he was a little short at the time, if I can remember, but he said he would if he could. He said, if I remember right now, that he would if he could make out; he was a little short of money himself at the time.

On page 3018 the witness testifies on cross-examination:

Q. As I understand you, Mr. Smith, there was no understanding or agreement between you and Mr. Emery or Mr. Colby, or anyone, that you should sell your land, before you filed on it?

A. No, sir.

Q. And no understanding or agreement that you should sell your land, before you made your final proof?

A. No, sir.

Q. And you had no talk with Mr. Kester or Mr. Kettenbach regarding the sale of your land, before you filed on it, or before you made your final proof?

A. No, sir.

The witness also states that the affidavit he made at the time he filed his sworn statement, was true.

CHARLES DENT.

The evidence of the witness Charles Dent appears on pages 716 to 736 of the record, and we quote therefrom as follows:

A. Mr. Emery was locator at that time, and he asked me if I had ever taken a claim, and I told him no, and he wanted to know why I didn't take one. Well, I told him I didn't know as I had much use for one; I couldn't sell it. "Oh, yes," he said, "I could sell a claim most any time." So I concluded I would take one. (Pages 718-719).

Q. Did he tell you how much the claim would net you?

A. Oh, I told him if I could get \$100.00 for the claim I wouldn't mind taking one. "Well," he says, "you can easy enough get \$100.00." He says, "Most anybody will give you \$100.00 for it."

The witness testifies, on cross-examination, at page 733, as follows:

Q. Mr. Dent, I understand your first conversation with Mr. Emery was at your place, was it?

A. Yes, sir.

Q. What was that conversation, as near as you can remember?

A. Oh, I don't know; there wasn't much of a conversation about it. He was locating people up there, and we just got to talking about it, about talking up claims, and he says to me, he says, "You have never taken one up, have you?" And I says, "No." And he says, "Why don't you take up a claim?" And I told him I didn't know, I didn't know as I could sell it if I did take one up, and he says, "Well, you could easily enough sell it for \$100.00," he says, "anybody most would give you \$100.00 for it." Well, I told him I thought if I could get \$100.00 I would take up a claim, but I didn't want to take up a claim and hold it, because I didn't want to pay the tax on it and I didn't know when I could ever sell it.

Q. You meant if you could get \$100.00 over and above what the claim cost you?

A. Yes.

Q. There was no understanding or agreement with him that you was to sell your claim to him, was there?

A. Oh, no.

Q. Or to anyone else?

A. No.

Q. When was your next conversation with him; the next conversation I believe was when you asked him if you could borrow the money to prove up on, or something to that effect?

A. I told him I didn't have the money, and he said they could let me have the money if I needed it, Colby said; and he owed me about \$60 or \$70 then, Emery did, but he didn't just have

it with him, so when I come down there I seen Mr. Colby, and he let me have the money.

On page 735 the witness testifies :

Q. * * * Now there was no understanding or agreement between you that you was to sell your land at that time, was there?

A. Oh, no, no. * * *

Q. Then, what conversation did you have in regard to the claim, after you made your final proof?

A. I didn't have no conversation much ; I just told Mr. Colby I would sell him the claim, and he said all right.

Q. Did you tell him what you would sell it to him for?

A. Yes.

Q. How much?

A. I told him if he would give me \$100.00 and pay me what it cost to prove up, he could have the claim.

Q. That was the first talk you had with either Mr. Colby or Mr. Emory regarding the sale of your claim?

A. Yes, sir.

Q. You had then proved up and had your final receipt, had you?

A. Yes.

The witness also states, on pages 735-736, that the affidavit he made at the time he filed his sworn statement, is true.

LON E. BISHOP.

The evidence of Lon E. Bishop appears at pages 2976 to 2994 of the record. At page 2981 the witness testifies:

MR. GORDON: Q. And did you talk with Mr. Emery about getting the money, or with Mr. Colby?

A. Well, I spoke about that we would have to have a settlement so I could get the money to prove up with.

Q. Now, who did you talk with about that?

A. I talked with Mr. Emery about it.

Q. What did Emery say?

A. He said he would settle up with me, and he would give me the money.

Q. Now, what settlement was it you were to have?

A. Well, I was working for him, you know, and I had worked for him quite a while, you know, and he had given me money along.

Q. Now, how much actual cash did you get that day from Colby?

A. Why, I got \$400.00.

Q. And how did you happen to get it from Colby? Did he owe you any money; or was it Emery that owed you the money?

A. Well, it was Emery. They were all connected together.

Q. Did you have any talk with Mr. Colby about it at all?

A. No.

Q. And where did you get the money from Mr. Colby?

A. Out here on the street.

At page 2990 the witness testifies on cross-examination as follows:

Q. Mr. Bishop, did you have any talk with Mr. Kettenbach, or Mr. Kester, or either of them, concerning the sale of your land, before you made your final proof?

A. N6, sir.

Q. Did you have any talk with Mr. Colby, or Mr. Emery about the sale of your land, before you made your final proof?

A. No, sir.

Q. When did you first conclude to make a sale of your land, in relation to the time you made your final proof?

A. Well, after I proved up.

Q. And who did you first talk with about the sale of your land?

A. Why, Emery.

Q. With Mr. Emery?

A. Yes, sir.

Q. And what did he tell you?

A. He told me that Kettenbach would buy.

Q. Did he tell you what he would give you for it?

A. No.

Q. And then, you had a talk with Kettenbach about it, did you?

A. Yes; I went over to see him.

Q. You went over to see him?

A. Yes, sir.

Q. And it was then you agreed on the price?

A. Yes.

Q. And then he told you to make out the deed?

A. Yes.

Q. And you made out the deed, and went over and had the deed made out?

A. Yes, sir.

Q. And executed it, and brought it back, and gave it to Mr. Kester, who was the cashier of the bank?

A. Yes, sir.

Q. And you told him that you was to get \$650.00 for it?

A. Yes.

Q. And he told you that was right?

A. Yes.

Q. Now, you stated that you paid back to Mr. Emery the money that you had borrowed from him. How much money had you borrowed from him?

A. Well, I don't remember just how much I did get from him. He owed me, and after I got this money, why, then I owed him.

Q. And I believe you said that you told him that you wanted to settle up, so that you could get the money to make your final proof with? You wanted the money to make your final proof with?

A. Yes.

Q. And you had a settlement, did you?

A. Well, he just gave me the whole amount, you know, and then I told him that I wanted to settle up, and he just gave me the amount.

Q. Gave you the amount?

A. Yes.

Q. And then when you paid him back it was determined then how much money he owed you before he let you have the \$400.00, was it?

Q. That is, determined how much money you had coming to you from him?

A. Yes.

Q. And then it was also determined how much money you owed him after he let you have the \$400.00?

A. Yes. * * * * *

At page 2992 the witness testifies:

Q. And you had no understanding or agreement with Mr. Emery that you would sell him the land, before you filed on it?

A. No.

Q. Or before you made your final proof?

A. No.

The witness also testifies, at page 2993, that the affidavit he made at the time he filed his sworn statement, was true.

It affirmatively appears from the evidence of this witness that he had no understanding with anyone for the sale of the land prior to the time he made his final proof, and it was after he made his final proof that he concluded to sell.

At pages 284-285, relative to these entries, Judge Dietrich in his opinion states:

"There is no contention that Kettenbach and Kester had anything to do with the entries until about the time of final proof, when, at the solicitation of Colby, they agreed to advance the money, and thereafter, closely following the final proof, they purchased the claims; it is obvious therefore that they could not have had any unlawful agreements with the entrymen. The theory of the government, however, is that such agreements had been entered into with Emery and Colby, or one of them, and that the defendants were advised of such agreements before they purchased the lands. Aside from the testimony of Robnett, there is no direct or positive proof that any one of the claims was invalid, and while the conditions surrounding the transfer are of such a nature as to warrant a close scrutiny of the claims, the circumstances are quite as readily reconcilable with the theory of the lawfulness as with the theory of the un-

lawfulness of the relations existing between the several entrymen and Emery and Colby. It is conclusively shown, I think, that in material respects Robnett's account of what occurred in the bank is incorrect, and I am convinced that the witness Colby truly states how Kettenbach and Kester came to purchase the claims. Upon the whole, it is thought that the evidence is insufficient to warrant a cancellation of any one of these patents.

We have heretofore stated that each and all of the entrymen were and are in conflict with Robnett; that Colby and Emory are in conflict with Robnett, and Judge Dietrich prefers to believe these witnesses instead of believing Robnett, and held the patents intact.

We most respectfully pray that a rehearing be granted in relation to these entries, to-wit, the entries of Lon E. Bishop, Frederick W. Newman, Charles Dent and Charles Smith.

In connection with these entries we call the Court's attention to the authorities cited under "Points and Authorities, II," pages 219-224 of our original brief, and we call the Court's attention especially to the case of *United States vs. Stinson*, 197 U. S., 200-204; 49 L. Ed. 724, in which the court says:

"2. The government is subject to the same rules respecting the burden of proof, the quality and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual."

Quoting from the *Maxwell Land Grant Case*, 121 U. S. 325; 30 L. Ed., 949, the Court in the Stinson case (*Supra*), says:

“It should be well understood that only that class of evidence that commands respect, and that amount which produces conviction, shall make such attempt successful.”

In *Colorado Coal & Iron Company vs. United States*, 123 U. S. 307, 31 L. Ed., 182, the Court says:

“It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing and unambiguous.”

It thus appears in the cases hereinbefore referred to, that the evidence is far from being clear, convincing or unambiguous; save and except that it occurs to us it is clear, convincing and unambiguous in favor of the appellees; and upon the evidence alone the patents should not have been cancelled.

We also call the Court's attention to a point made in our original brief: —that the Court below saw the witnesses in two other trials, observed their manner of testifying, had a better opportunity to understand the facts and circumstances surrounding their evidence, and, after seeing the witnesses and hearing them testify, the lower court found in favor of the ap-

pellees and against the contentions of the appellant; and we again call the Court's attention to the case of the *State of Idaho vs. Baird*, 13 Idaho, 126; 89 Pac. 298, wherein the Court says at page 137 of the Idaho Reports:

"It is urged, however, that the case was tried by the Court, upon the evidence taken by the stenographer at the former trial, and that the Court had no witnesses before it and for that reason the rule last above stated does not apply herein. This Court has held that that rule did not apply when the trial Court heard the case on written or documentary evidence, but it will be observed in this case that the Judge who decided this case sat at the former trial and heard the witnesses testify, and, no doubt, observed their demeanor on the stand, and, if that be true, the rule first above stated would apply.'

II.

WILLIAM McMILLAN.

The entry of William McMillan is in no way connected with the evidence of Clarence W. Robnett, it appearing affirmatively from the evidence that Robnett had nothing to do with the entry, and the evidence of this witness would have no bearing upon the same.

We call the Court's attention to the evidence of William McMillan, appearing at pages 532 to 551 of the record. At page 534, the witness testifies that he had a conversation with George H. Kester concerning the taking up of a timber claim:

Q. Well, what was Mr. Kester's business there at that time?

A. Well, his business, he was up in the upper country some way, and he was well acquainted with me, and he was up in there and it was a high cut across that way to Orofino, and he rode past there and called in to see me.

Q. When was this conversation?

A. It was in October, 1904, I think. * * *

Q. Now, what did Mr. Kester say?

A. Why, he asked me something about whether I had used my right for a timber claim, and wasn't I going to take one, and I told him I hadn't. I didn't know anything about timber claims at that time. I told him I hadn't, and told him that I didn't have money enough to take one without mortgaging my place, and I told him I wouldn't do that, and so he said if I took a notion to take one if I needed a little money he would help me out, which he did. I had part of the money but I didn't have enough.

Q. Did you ever see him again or talk with him again before you filed on your claim?

A. No, I didn't. I never seen him till after I had filed on my claim. * * * * *

On page 535 the witness testifies that he had made arrangements with Mr. Dwyer to locate him on the land, and on page, 536, in response to a question, the witness testified:

Q. Was there anything said to you about the value of the claim?

A. No; but he told me I would be safe enough in taking one, if I could raise the money to prove up; it would come in the market pretty soon. There wasn't any timber claims hardly selling at that time.

Q. Did he tell you that he would insure you so much money over and above expenses?

WITNESS: Well, he said I would be safe enough; that I could make \$100.00 or \$150.00 for it anyhow—safe enough to take one.

MR. GORDON: Q. Now, how did he express that?

A. Why, he said that I would be safe enough, you know; something to that effect; I couldn't just tell you word for word now.

Q. Well, what was that about the \$1.00.00 or the \$150.00?

A. Well, that he was pretty sure I could make that much out of it above expenses, and I was well satisfied with that at that time, if I could make that much. I didn't know whether I could make it or not. I was pretty sure I could make that, or he wouldn't have told me I could make that much.

Q. Did you know of anyone at that time that was buying claims?

A. No, I didn't. I knowed some of them had claims that couldn't sell them.

Q. Did you have any understanding or agreement with Mr. Kettenbach, or Mr. Kester, when you first talked with him, as to whether you were to turn that claim over to him?

A. I did not.

Q. Or to anyone he told you to?

A. I didn't have any agreement.

Q. Did you have an understanding?

A. Well, no, I don't know that I had any understanding. I understood that I could turn it over to him if I had a mind to, but I could turn it over to anybody else. I wasn't forced to turn it over to him.

Q. Well, was it your understanding when he made the agreement with you that he would furnish you the money, that you would turn it over to him?

A. No, there was no such agreement as that at all.

Q. What's that?

A. No, I didn't make any such agreement as that at all, whatever.

Q. Well, what did you expect to do with that claim when you took it up?

A. I expected to sell it as soon as I could and get what I could out of it.

Q. And who did you expect to sell it to?

A. Well, I expected to sell it to whoever would buy it. Of course, he told me about it, and I would give him the preference.

Q. But that is what you expected to do when you had your first talk with him and when you came to the conclusion that you would take it up?

A. When I had my first talk with him I didn't have much idea, and I thought it over for a day or two, and then I thought I would.

The witness then states that a man by the name of Bliss located him on the land, and that Mr. Dwyer made arrangements with Mr. Bliss to locate him.

On pages 540-541 the witness testifies to the manner in which he procured the money to make his final

proof, and in response to questions, the witness testifies:

Q. Do you remember whether or not you saw Mr. Kester then, before you made your final proof?

A. Yes, I seen him.

Q. Where did you see him?

A. I seen him at the bank where he worked at the time.

Q. Right in the bank?

A. Yes.

Q. And what was your conversation with him then relative to this claim?

A. Why, nothing more than I told him, I says to him I had taken a claim and I haven't got money enough, and he says, "I will help you out," and he wanted to know how much it was, and I told him how much I wanted. In fact, he told me when I first seen him that he would help me out, and he didn't go back on his word.

Q. Now, do you remember how much you got on that occasion?

A. I think I got about \$300.00, something like that. I had something over \$100.00 of my own. It took \$400.00 to prove up on, and I had something over \$100.00.

Q. Was that the same day that you made your proof? * * *

A. Yes. I came in on the train and proved up the same day.

Q. And did you give Mr. Kester a note?

A. I did not. He didn't ask for any.

Q. You say you didn't, and he didn't ask for one?

A. No. * * * *

On page 549 the witness testifies on cross-examination that he sold the land nearly two years after

he made his final proof; that there were no buyers in the field, and no one offered to purchase the same; that he used \$100.00 of his own money to pay the purchase price; that the balance of the money he borrowed from Mr. Kester; that he told Mr. Kester he would pay it back when he sold his claim; that he had no contract or agreement for the sale of the land prior to the time he made his final proof, and that the affidavit he made at the time he filed his sworn statement, that he had no agreement to sell the land, was true.

On page 551 the witness testifies that he did not feel that he was under any obligations to sell the land to Mr. Kester, except that he should give him a preference right to purchase it; and that he did not feel that Mr. Kester was under any obligations to purchase the land.

It affirmatively appears that Mr. McMillan was entitled to exercise his stone and timber right; that he filed upon the land, used \$100.00 of his own money to pay the purchase price, and borrowed the remainder from Mr. Kester to pay for the land; that he kept the land for two and a half years after making his final proof, and finally sold the same to Kitty E. Dwyer. The record does not contain the slightest in-

timation of an agreement to sell his land prior to final proof, or for two and a half years thereafter.

In relation to the entry of McMillan we also call the Court's attention to the opinion of Judge Dietrich, appearing on page 296 of the record, wherein, after a careful consideration of all of the evidence bearing upon the entry, Judge Dietrich states:

"There was some sort of a general promise by Kester, who seems to have been very friendly to the entryman, to give him assistance if he needed financial help when it came to making his final proof. A careful consideration of the entryman's testimony convinces me that he did not have any understanding, express or implied, by which he was to sell the land to any person, and that no other person had any interest in the entry. The entryman apparently did feel under some moral obligation to give to the defendant Kester an opportunity to purchase, but such obligation involved only a recognition by the entryman that Kester favored him by loaning him a part of the money required for the final proof."

From Judge Dietrich's knowledge of the case, and his acquaintance with the surrounding circumstances, he was not convinced that the evidence was clear, convincing, conclusive and unambiguous, and held that it did not come within the rule laid down by the Supreme Court of the United States, defining the nature of the evidence necessary to justify the cancellation of a patent.

We are convinced that a re-consideration of this evidence and a re-examination of Judge Dietrich's opinion in relation thereto, will convince the Court that it did the defendant Kitty E. Dwyer an injustice in holding for cancellation this entry.

III.

In relation to the remaining patents, Carrie D. Maris, John H. Little, Ellsworth M. Harrington, Bertsal H. Ferris, George Ray Robinson; also Soren Hansen, Drury M. Gammon, David S. Bingham; Charles E. Loney, Mary A. Loney, Frank J. Bonney, James T. Jolly, Effie A. Jolly, Charles S. Myers, Janie Myers and Clinton E. Perkins, we call the Court's attention to our original brief in relation to these entries, and references to the record therein made; that of eBrtsal H. Ferris, appearing at page 23 of our brief, and wherein the said Bertsal H. Ferris testified that he kept his land two or three years after he made his final proof before he sold the same; that the first agreement he made in relation to the sale of his land was when he agreed to sell it to Kettenbach two or three years after making his final proof; that he tried to sell it to other parties, and at one time gave an opinion to Fred Emery.

GEORGE RAY ROBINSON.

The evidence of George Ray Robinson appears at pages 25 to 27 of our original brief, and we would call the Court's attention to the evidence of George Ray Robinson, appearing on page 27 of our original brief, (pages 1341-1342 of the record), wherein the witness testifies that he remembered of Mr. Kettenbach talking to him on the street concerning the payment of his note, and that Mr. Kettenbach urged him to keep his land, and pay the interest, or the principal in \$5.00 payments; and that Mr. Kettenbach wanted him to pay \$5.00 per month; that he told Mr. Kettenbach that he could not sell his land to anyone else, and that Mr. Kettenbach told him, if he was not satisfied to keep the land, he would look over the papers and see how much he could allow him for the claim; that he had carried his note then upwards of two years.

If it be a fact that William F. Kettenbach or George H. Kester was endeavoring to acquire this land, he would not have reluctantly purchased it at the price it was offered, and especially when he was paying more for the land than it could be sold for to anyone else.

Concerning the entries of Bertsal H. Ferris and George Ray Robinson, Judge Dietrich in his opinion,

at pages 321-325, discusses the evidence in relation thereto, and on page 322 Judge Dietrich states:

“It is abundantly shown, I think, that there was no intention on the part of the entrymen until long after final proof to convey to Kettenbach, and that there was no expectation on the part of Kettenbach, when he left Robnett or the entrymen have the money, that he would secure title to the lands. The entrymen, as appears from the dates of the deeds, held the lands a considerable length of time, and transferred them to Kettenbach because they were unable to do any better with them. Ferris realized nothing out of the transaction, and apparently lost some personal expenses. Robinson netted approximately \$70.⁰⁰. It is also plain that Robnett felt under no obligation to purchase the land and exercised no real control over the sale thereof. The understanding, as I gather it from all of the evidence and the circumstances disclosed by the record, including the statements of the several parties, is that Robnett, in encouraging these men to make entries, led them to believe that he would be able to negotiate a sale of the lands after title was secured, so that they would realize a substantial profit, and in that belief they entered the lands and assumed the mortgage obligations referred to.”

CARRIE D. MARIS.

The evidence of Carrie D. Maris appears at pages 6 to 11 of our original brief, and we call the Court's attention to page 8, wherein the witness testifies to the repeated efforts Robnett made to sell her land

to other parties, and wherein Robnett called up a man at Moscow who claimed he was ready to purchase the land; and, after repeated efforts, it was finally sold to Kester and Kettenbach, who paid a higher price for the land than Robnett was able to sell it for to anyone else.

We also call the Court's attention to Robnett's affidavit, portions of which are copied on page 10 of our original brief, wherein Robnett testified that no prior agreement existed between himself and Carrie D. Maris, and that no arrangements whatever existed between himself and George H. Kester and William F. Kettenbach for the purchase of this particular claim for more than a year after final proof was made.

In his opinion, at pages 305 to 308 of the record, Judge Dietrich discusses the evidence in relation to this claim, and on page 307 the Court states:

"As already stated, it is impossible to read the testimony of the entryman without being impressed with the fact that, for a long period of time before the sale to Kester and Kettenbach, Robnett had been making strenuous efforts to dispose of the land, but in vain. Apparently the highest offer he had ever received was \$1,500.00. Under these circumstances it seems quite incredible that he, as the owner of this land, and being anxious to sell it and get as much as possible for it, and having been unsuccessful in selling it to strangers, would go to Kester and Ket-

tenbach and lay bare the facts disclosing the invalidity of the title, for the purpose of inducing them to pay \$100.00 more than he had ever been offered for the land. Only great simplicity of character, together with a highly sensitive conscience, would account for such an unusual proceeding, and it is hardly necessary to add that Robnett seems to have possessed neither these qualities in a very high degree."

The discussion of Judge Dietrich in relation to this entry is very interesting in view of the fact that Robnett had made an affidavit as late as July 1st, 1909, (appearing at page 10 of appellees original brief) in which he stated under oath that no agreement existed between Carrie D. Maris and Kester and Kettenbach for the sale of the land prior to the time final proof was made, and that no relations existed between him, Robnett, and Kester and Kettenbach, concerning the sale of the land, prior to final proof.

JOHN H. LITTLE.

The evidence of John H. Little appears at pages 12 to 15 of our original brief, (pages 1609 to 1627 of the record), and we would especially call the Court's attention to the evidence of Mr. Little, wherein he stated that Robnett never mentioned the names of Kester and Kettenbach as being parties who were

prospective purchasers of the land, and, on page 14, Mr. Kettenbach told the witness to try to sell his land to some one else; that he did try to sell to other parties, but was unable to do so; that his arrangement with Robnett was not carried out; that Kettenbach told the witness that he had nothing to do with Robnett.

On page 15, the witness testifies that he had no contract, understanding or agreement with Mr. Kettenbach, Mr. Kester, or Mr. Dwyer, prior to the time he made his final proof.

Judge Dietrich refers to the claim of John H. Little in his opinion, at pages 318-321; and on page 319 the Court says:

“As already noted, Robnett does not testify that he was to control the sale of the land, and if he was to have the control and disposition of it, it would be strange if the amount which the entryman was entitled to realize was left in such an indefinite status. From Robnett’s testimony it appears that when the arrangement was made for this entry the money for the purpose was to be procured from Curtis Thatcher, who advanced a small amount for the payment of preliminary expenses, but then, for some reason, did not carry out his agreement. Upon initiating the entry, and before final proof, Little gave a note for the location fee, amounting to either \$125.00 or \$150.00, according to Robnett’s testimony. This was afterwards taken care of by the money procured from Kettenbach. According to Robnett’s testimony, which is in

harmony with that of Kettenbach and Little, Kettenbach originally had no interest in the entry, and had no expectation of getting the title. He (Robnett) testified:"

"Q. Now, what became of that claim, do you know?"

"Q. It was finally deeded to Mr. Kettenbach."

"Q. Do you remember the transaction in connection with that, the conversation relative to it?"

"A. Why, the deal failed to go through that I had at the time of the location, and of course the mortgage came due, and Mr. Kettenbach told Mr. Little that he would have to either pay the mortgage or deed the claim, and he deeded the claim."

"Robnett testifies in general language that Kettenbach and Kester knew of the arrangement he had with Little, but he does not say what he told them or in his conversation with them what arrangement he claimed to have had with Little. The entryman appears to have testified frankly, and as to his arrangement with Robnett he said:

"Q. Now, what were you to do with this claim after you took it up, what was your arrangement?"

"A. Well, the understanding was that Robnett was to find me a buyer for the claim. He guaranteed to sell me the claim—to sell the claim for me."

"Q. Did he tell you when he would sell it?"

"A. Why, he said the chances were favorable for an early sale—a verbal agreement was all."

"Q. Did he tell you whether or not he

had anybody in mind or was assembling claims?" "

"A. No, not at that time he didn't, not until after we had proved up, before he made any statement in regard to assembling claims.' "

"Q. Now, did he tell you how much you were to get out of your claim? This is the first talk you had with him before you filed?" "

"A. Well, when we came back he told me what a valuable claim I had got. I don't remember the amount, but he discussed it, and I felt very jubilant over the fact that I had got a good claim. I had taken his word for it all.' "

"If the entryman had an agreement by which he was to get only a small specified amount out of the claim, his state of mind upon being informed that he had a good claim is not easily explained. He would have had no very great interest in the nature of the claim if he was guaranteed so much and was to get only so much out of it. The entryman further testifies that Robnett disappointed him in not getting a purchaser for the claim, and that Kettenbach was urging the payment of the mortgage and was threatening to foreclose. He went to Kettenbach and tried to induce him to purchase the claim. Kettenbach told him he was not buying timber, and advised him to try to sell to someone else, but finally took the claim and paid him a trivial amount in excess of what was due upon the mortgage.' "

"I conclude that the evidence does not support the charge that there was any fraud in the original entry, or that Kettenbach at the time he purchased had knowledge of any alleged

fraudulent agreement between the entryman and Robnett.”

We feel that a reconsideration of this entry, and a reexamination of the evidence in relation to the same, will convince the Court that this patent should not be cancelled, and that an injustice is being done the defendants in the cancellation of this entry.

We respectfully pray for a rehearing and a reconsideration of the evidence in relation to this entry.

ELLSWORTH M. HARRINGTON

The evidence of Ellsworth M. Harrington appears at pages 15 to 17 of our original brief, (pages 1355 to 1360 of the record) wherein the witness testifies that Robnett was not to sell the land for him, but in case he did sell it he was to receive a commission; that no agreement existed for the sale of the land.

“Q. You mean you didn’t have any written agreement?”

“A. No, nor no verbal agreement in that way; not positive. He was dealing in timber claims, and if he had a chance to sell it, he had my permission to sell it.”

The witness also testifies that he had no arrangements with either Kester or Kettenbach to purchase the land.

We call the Court’s attention to the opinion of Judge Dietrich in relation to the entry of Ellsworth

M. Harrington, appearing at pages 313 to 316 of the record.

On page 314 the Court states: (Beginning at bottom p. 313).

"According to Kettenbach's testimony, he took the mortgage and finally purchased the claim practically under the same circumstances as are shown to have surrounded the mortgages upon, and the purchase of, the Long claims. Harrington himself testifies, and his statement is not disputed, that he realized clear out of the claim \$299.40, and so far as appears Robnett got nothing except the location fee and possibly the bonus or a part of the bonus included in the mortgage note. It is quite clear that Kettenbach had no understanding before or at the time he took the mortgage that he was ultimately to procure title to the land, for efforts were made by Robnett and Harrington to sell to other parties, and, being unsuccessful, the entryman sold to Kettenbach."

"The only evidence relative to the regularity of the entry is found in the testimony of Robnett, already referred to, and that of the entryman. The entryman's version of the arrangement between himself and Robnett is materially different from that of Robnett, and, if true, there was no unlawful or improper agreement or understanding. The entryman appears to have testified with considerable candor. In reply to questions put to him by counsel for the government he testified that prior to making the entry there was nothing said as to what he would make out of the transaction or about the sale of the land. He said:

"Q. Was anything said about what the land was worth?" "

“‘A. There may have been; I don’t remember; I think there was though. I think it was in the neighborhood of \$1,000.00; I ain’t positive though.”

“‘Q. Now, what was said? Was it said that you could get \$1,000.00 out of it?’”

“‘A. Well, no. He (Robnett) may have said it was worth in that neighborhood, of \$1,000.00; there was nothing said positive that it was.’” * * *

“‘Q. Now, what was there in it for him?’”

“‘A. Well, he was to get a commission out of it for selling the claim, I think.’”

“‘Q. And he was to sell the claim?’”

“‘A. No, he wasn’t to sell it. If he did sell it he was to get a commission for selling it. There wasn’t no agreement that he was to sell it.’”

On page 316 the Court states:

“I conclude that the record does not sustain the contention either that the entry was invalid or that Kettenbach, at the time he made the purchase, had notice of any alleged invalidity.”

SOREN HANSEN.

The evidence of Soren Hansen appears at pages 100 to 105 of our original brief, and we would especially call the Court’s attention to the evidence of this witness, wherein he testifies that Robnett told the witness he ought to get from \$300.00 to \$500.00 out of the place, and he could receive that when he sold the land:

“Q. How were you to get the three or five hundred dollars out of it.”

“A. Why, when he sold it. He said he would be able to sell it; he had more claims, and he would be able to sell it for me.”

The witness also testifies to the several deeds he executed, and also states that he had no understanding or agreement with either Kester or Kettenbach for the purchase of the land.

We also call the Court's attention to the evidence of William F. Kettenbach upon this same question, appearing at pages 1689 to 1691 of the record; also to the evidence of E. N. Brown, appearing at pages 1667 to 1687 of the record.

The evidence falls far short of being clear, conclusive and unambiguous, and is in direct conflict with the evidence of Clarence W. Robnett.

DAVID S. BINGHAM

The evidence of David S. Bingham appears at pages 126 to 130 of the appellees' brief, and at pages 1139 to 1171 of the transcript, and on page 127 of our original brief, we copied the evidence of the witness relative to the manner in which he took up his timber claim, and wherein the witness testifies that he never talked with Kettenbach, Kester or Dwyer concerning the taking up of the land; that he trans-

acted his business with Mr. O'Keefe; and the only understanding he had with Mr. O'Keefe, relative to this land, was that Mr. O'Keefe was to have the prior right of buying it when the witness proved up.

On pages 128-129, of our original brief, the witness testifies to his negotiations with Mr. O'Keefe relative to the sale of the land, and that there was a ten-acre tract in Cloverland Orchard Tracts which the witness desired to purchase, and by making a sale of his land at that time, he could purchase this tract of land. The evidence of the witness is very clear that O'Keefe and the witness arrived at an agreement for the purchase of the land at that particular time, and this was in the neighborhood of two years after the witness had made his final proof.

In relation to the entry of David S. Bingham, Judge Dietrich in his opinion, at pages 342 to 349, gives a very clear statement of the circumstances surrounding the evidence in relation to this entry, and at page 345 of the record quotes the evidence of the entryman in relation to his entry and his final proof, and at page 349 states:

"Clearly such testimony, with its apparent inconsistencies and contradictions, cannot be taken as satisfactorily establishing the affirmative proposition that there existed between the entryman and O'Keefe at the time entry was initiated any understanding or agreement upon

the part of the entryman that he was to sell to O'Keefe or to sell to any person for any fixed price. An understanding by an entryman that if he sold he would give the first opportunity to a designated person to purchase, provided such person would give as much as anybody else, does not constitute an agreement obnoxious to the statutes pertaining to the entry of timber lands."

It will also be observed that Jackson O'Keefe was dead at the time of the hearing; his evidence could not be produced, and the defendants were at a disadvantage in proving conclusively that there was no fraud or irregularity in connection with this entry.

We believe that upon a reexamination and a rehearing upon this entry, the Court will be convinced that this patent should not be cancelled.

IV.

THE STEFFY GROUP.

This group includes the entries of Charles E. Loney, Mary A. Loney, Frank J. Bonney, James T. Jolly, Effie A. Jolly, Charles S. Myers, Janie Myers, and Clinton E. Perkins.

We can add but little to what we have heretofore said on pages 69 to 92 of our original brief, and we most respectfully call the Court's attention to the

argument and quotations from the evidence appearing thereat; and believe that a re-examination of the record in relation to these entries will convince the Court that the defendants Kester and Kettenbach had no knowledge of the manner in which the claims were acquired, or of any irregularity in connection therewith; and we most respectfully request that a re-hearing be granted in relation to these claims.

We also desire to call the Court's attention to the verdict of the jury, appearing at page 4180 (bottom) of Vol. XI. of the records, wherein the defendants were acquitted upon the charge of conspiracy in relation to the acquisition of title to the lands involved in this proceeding. Almost all of the entries referred to herein were involved in those indictments, and those entries not specifically referred to in the indictments were referred to in the evidence, and the witnesses appeared and testified in relation thereto, which has as much force as if they had been set out and specifically described in the indictments. We are firmly of the belief that this verdict of acquittal by a jury should have great weight with the court, and especially so when the trial Judge who saw the witnesses, and observed their manner of testifying, also found in this case in favor of the defendants in relation to these particular entries. Vol. XI, Page 4180 (bottom).

V.

DRURY M. GAMMON

We have referred to the entry of Drury M. Gammon at pages 113 to 114 of appellees brief, and we can add little to what we have there said; but we are convinced that a re-examination of the record, and of the evidence of Drury M. Gammon, will convince the Court that this patent should not be cancelled.

It is unreasonable to assume that Robnett would advise the officers of the bank of the irregular manner in which the title to this tract of land was acquired. It was to his interest to keep it secret, and to prevent the officers of the bank from obtaining knowledge of the same.

We respectfully submit that a re-examination of the evidence and of appellees' brief in relation to this entry will convince the Court that the patent should not be cancelled.

Your petitioners severally pray, therefore, that an order may be made and entered for a re-hearing of the argument in this cause, on a day to be appointed by this Court, at the present term, and upon such points as the Court may direct.

WILLIAM F. KETTENBACH and
GEORGE H. KESTER.

By GEO. W. TANNAHILL,
Residing at Lewiston, Idaho,
Their Counsel.

GEO. W. TANNAHILL,
Residing at Lewiston, Idaho.

Attorney for petitioners for whom he appears.

JAMES E. BABB,
Residence: Lewiston, Idaho,

Attorney for petitioners for whom he appears.

The undersigned, attorneys for petitioners, DO
HEREBY CERTIFY: That in their judgment the
foregoing petition for a re-hearing is well founded,
and that it is not interposed for delay.

Dated this 12th day of November, A. D. 1913.

GEO. W. TANNAHILL, and
JAMES E. BABB,
Counsel for Appellees.

